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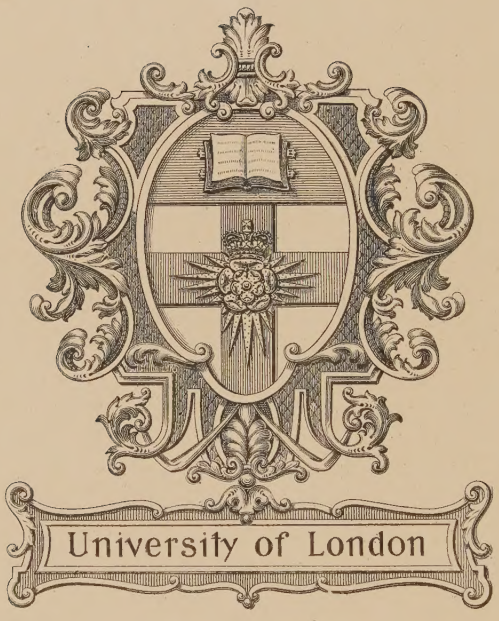

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DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

[IN THE COURT OF APPEAL.]

C. A.
1927
May 30.

GILBERT *v.* GILBERT AND BOUCHER.

Divorce—Practice—Variation of Settlements—Preliminary Investigation by Registrar before Decree Absolute—Jurisdiction—Matrimonial Causes Act, 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Matrimonial Causes Rules*, 1924, *r.* 71—*Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *ss.* 192, 226.

The substitution of the word "decree" in s. 192 of the Judicature (Consolidation) Act, 1925, for the words "final decree" in s. 5 of the Matrimonial Causes Act, 1859 (which it reproduces), and for the words "decree absolute" in r. 71 of the Matrimonial Causes Rules, 1924, made under s. 5, and which is still in force under s. 226, sub-s. 1 (*a*), of the Act of 1925, has not made any alteration in the law as it stood after the decision in *Clarke* v. *Clarke and Lindsay* [1911] P. 186. Accordingly, the Court has no jurisdiction either by itself or its officers to hold an inquiry upon a petition to vary settlements until the decree for dissolution has been made absolute.

APPEAL from a decision of Bateson J.

On July 5, 1917, the petitioner Walter Raleigh Gilbert was married to the respondent Beryl Franziska Kathleen Bianca Gilbert (then B. F. K. B. Stanhope).

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GILBERT v. GILBERT AND BOUCHER.

On April 26, 1926, on a petition presented by the husband, a decree nisi was pronounced dissolving the marriage on the ground of the wife s adultery, and ordering that the children of the marriage should remain in the custody of the husband. The decree nisi had not yet been made absolute.

The wife was entitled to the income of certain property, subject to the usual restraint upon anticipation, under two post-nuptial settlements, both dated December 14, 1925, which dealt with personalty and realty respectively.

On October 30, 1926, the husband filed a petition for a settlement of the wife's property. An answer was put in by the wife, showing that her position with regard to the property had changed as she had settled it by a settlement, dated September 26, 1925, on a child whose legitimacy was disputed.

On March 25, 1927, the husband filed a petition to vary the existing settlement. Thereupon, on May 2, 1927, the wife issued a summons calling upon the husband to show cause why the petition to vary should not be taken off the file or dismissed on the ground that the decree absolute had not yet been pronounced.

On May 5, 1927, the registrar made an order dismissing the petition, and on the same day the husband issued a summons calling on the wife to show cause why the registrar's order should not be set aside.

On May 9, 1927, Bateson J. dismissed the appeal, but gave leave to appeal to the Court of Appeal.

Both the registrar and Bateson J. held that in accordance with the wording of r. 71 of Matrimonial Causes Rules, 1924, a petition to vary settlements could only be filed after a decree absolute had been made, and the judge further held that a "decree for divorce" in s. 192 of the Judicature (Consolidation) Act, 1925, meant a final decree absolute and not a decree nisi, which was not a decree for divorce at all.

The husband appealed. The appeal was heard on May 30,1927.

Bayford K.C. and the *Hon. Victor Russell* for the appellant. It is submitted that s. 192 of the Act of 1925 has superseded

r. 71 of the Matrimonial Causes Rules, 1924, and that inasmuch as s. 192 does not contain the words " decree absolute " as contained in the rule, but only the words " decree for divorce," the Court should construe the latter words as including a decree nisi, and should hold that notwithstanding the rule, a petition for variation of settlements can be presented at any time after decree nisi although no order thereon can be made until after a final decree. The reason for such a course being adopted is that a petition when filed operates as a lis pendens: *Loraine* v. *Loraine* (1), and thus prevents a wife when she becomes a feme sole doing an act in relation to any property subject to a restraint on anticipation to the prejudice of her husband. It is very important that practitioners should be able to put matters in train so that they may be able to bring on the petition to vary at the same time that the decree is made absolute and so avoid a hiatus. In the present case the wife is entitled to a jointure which is subject to a restraint on anticipation. When the decree is made that restraint will become inoperative.

In *Cavendish* v. *Cavendish* (2) a report for maintenance was allowed to be confirmed before decree absolute. In *Waterhouse* v. *Waterhouse* (3) an order was made on the husband to secure maintenance to the wife to take effect upon the decree becoming absolute.

The word " after " in s. 192 of the Act of 1925 has the same meaning as " on " in the maintenance sections ss. 190 and 191, and " on " may mean " on, simultaneous with, and after ": *Fox* v. *Fox*. (4)

[SARGANT L.J. The decision in that case was before the Act of 1925 came into operation.

LORD HANWORTH M.R. The words " on and after " will not do for you: *Bradley* v. *Bradley*. (5)]

The word " final " which appears in s. 5 of the Matrimonial Causes Act, 1859, is deliberately omitted from s. 192 of the Act of 1925, which reproduces the section, and it is

(1) [1912] P. 222, 231.
(2) [1913] P. 138.
(3) [1893] P. 284.
(4) [1925] P. 157, 167.
(5) (1878) 3 P. D. 47.

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GILBERT v. GILBERT AND BOUCHER.

submitted that the Legislature must have had some object in so omitting it.

[SCRUTTON L.J. referred to the statement of Fry L.J. in *Mitchell* v. *Simpson* (1) and to that of Lord Herschell in *Bank of England* v. *Vagliano Brothers* (2) as to the effect of a consolidating Act.]

Sect. 32 of the Matrimonial Causes Act, 1857, contemplated that an inquiry might be made before a final decree. In *Clarke* v. *Clarke and Lindsay* (3), in which it was held that the Court had no jurisdiction to hold an inquiry upon a petition to vary settlements until the decree for dissolution had been made absolute, the Court did in fact allow the petition to remain on the file; as was also the case in *Constantinidi* v. *Constantinidi*. (4) Here, however, the petition has been dismissed.

It will be very difficult to safeguard petitioners unless there is power in the Court to vary settlements before decree absolute.

[SCRUTTON L.J. referred to *Jagger* v. *Jagger*. (5)]

W. O. Willis K.C. and *T. Bucknill* for the respondent. This is purely a question of law, and it is submitted that the decision of the learned judge was perfectly right.

Under the Matrimonial Causes Act, 1857, there was only one decree pronounced and that was a "decree declaring such marriage to be dissolved": see s. 31. By s. 32 power was given to the Court "on any such decree" to order the husband to secure to the wife a gross or annual sum of money by way of alimony. The Act contained no provision for the variation of settlements. Then by the Matrimonial Causes Act, 1859, s. 5, it was provided that the Court "after a final decree" of dissolution of marriage might inquire into the existence of ante-nuptial settlements made on the parties and make orders with reference to the application of the whole or any portion of the property settled. By the Matrimonial Causes Act, 1860, the decree nisi was introduced for the first time,

(1) (1890) 25 Q. B. D. 183, 190.
(2) [1891] A. C. 107, 144, 145.
(3) [1911] P. 186.
(4) [1904] P. 306.
(5) [1926] P. 93.

and by s. 7 it was provided that a decree for divorce should in the first instance be a decree nisi not to be made absolute till after the expiration of not less than three months from the pronouncing thereof, subsequently extended to six months by s. 3 of the Act of 1866. By s. 1 of the Act of 1907 the Court "on any decree" for dissolution of marriage was empowered to grant maintenance and alimony to the wife. The decree there, it is submitted, means decree absolute. In 1911 *Clarke* v. *Clarke and Lindsay* (1) was decided and it was there held that the Court had no jurisdiction under s. 5 of the Act of 1859 to hold any inquiry upon a petition to vary settlements until the decree for dissolution had been made absolute. Then came the Judicature (Consolidation) Act, 1925, which by s. 192 reproduced the provisions of s. 5 of the Act of 1859, and by s. 226 preserved the then existing rules. It is submitted that *Clarke* v. *Clarke and Lindsay* (1) is still law.

[They were stopped.]

LORD HANWORTH M.R. This appeal fails. It raises a short, though important point of divorce practice. On April 26, 1926, a decree nisi for dissolution of marriage was pronounced in this case. It was subsequently discovered that certain settlements had been made by the wife and thereupon, on March 25, 1927, before the decree absolute had been pronounced a petition was filed by the husband to vary those settlements. On May 2, 1927, a summons was taken out by the wife to remove the petition from the file on the ground that the decree had not been made absolute. On May 5, the registrar made an order removing the petition from the file, and on May 9, that order was affirmed by Bateson J. The husband now appeals.

The matter stands in this way. Until the Matrimonial Causes Act, 1859, was passed, there was no power in the Court to make orders for the variation of settlements on a divorce, but by s. 5 of that Act it was provided: "The Court after a final decree of nullity of marriage or dissolution of

(1) [1911] P. 186.

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marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit." The section is quite clear in its terms that the moment at which the power of the Court arises to deal with settlements made on marriage is "after a final decree of nullity of marriage or dissolution of marriage" has been made.

Following that section, r. 71 of the Matrimonial Causes Rules, 1924, was made which is still in force. It provides that "Application to vary marriage settlements shall be made by petition filed after but within one calendar month of decree absolute unless such time is extended by a judge on summons personally served on the husband or wife as the case may be, the trustees of the settlements, and such other persons as the registrar shall direct." Therefore by the section itself and the rule the time when a petition to vary marriage settlements must be filed is after a final decree has been made. And in *Clarke* v. *Clarke and Lindsay* (1) it was laid down that the Court had no jurisdiction either by itself or through its officers to hold any inquiry upon a petition to vary settlements until the decree for dissolution had been made absolute. Cozens-Hardy M.R. there said (2): "I can see no jurisdiction whatever to take any proceedings to rescind or vary the settlement until after the decree is made absolute. . . . . The idea of allowing proceedings to be taken when it is uncertain whether the decree absolute will ever be made is to my mind little short of absurd." Buckley L.J. said (2): "At a time which has not arrived and may never arrive and in an event which has not happened and may never happen there will be a jurisdiction in the Divorce Court to vary this settlement upon a petition being presented for that purpose. The husband has petitioned at a time when the Court has no jurisdiction in the matter." And

(1) [1911] P. 186. (2) [1911] P. 189.

Kennedy L.J. said (1): "The statute is clear that the Court has no jurisdiction in the matter until after the decree absolute." That explicit decision of this Court is consonant with the terms of the section and the rule.

But it is contended that the Judicature (Consolidation) Act, 1925, has introduced an alteration in the powers of the Court. Sect. 192 of that Act, which reproduces s. 5 of the Matrimonial Causes Act, 1859, is as follows: "The Court may after pronouncing a decree for divorce or for nullity of marriage enquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the Court thinks fit, and the Court may exercise the powers conferred by this sub-section (2) notwithstanding that there are no children of the marriage." It is said that inasmuch as the word "final" which was in s. 5 of the earlier Act has been left out in s. 192 of the later Act, some alteration of the law must have been intended by the omission, and, therefore, that the word "decree" must be read as meaning either a "decree nisi" or "decree absolute," and that the effect is to alter the law as laid down in *Clarke* v. *Clarke and Lindsay*. (3)

Is it possible to give such an interpretation to s. 192? It is to be borne in mind that the Act of 1925 is a consolidating statute, and that by s. 226, sub-s. 1 (*a*), of the Act nothing in the repeal is to affect any Order in Council, rule, order or regulation made, commission issued, direction given, or thing done, under any enactment repealed by the Act, and that every such Order, rule, order, regulation, commission or direction is to continue in force, and to have effect as if made, issued or given under the Act. The object, therefore, of the Act was to consolidate and reproduce the law as it s ood before the passing of that Act. Applying that meaning

(1) [1911] P. 190. (2) *Sic*, but there are no sub-sections.
(3) [1911] P. 186.

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to the Act of 1925, it appears to be difficult to say that s. 192 is not fully satisfied by reading the words "after decree" as meaning "after final decree."

The importance of treating a consolidating Act as what it says it is and not as one amending the law is shown by *Mitchell* v. *Simpson*. (1)

We do not get much assistance in this case from the cases on alimony, which we considered recently in *Fox* v. *Fox*. (2) The sections of the Act of 1925 which deal with alimony are not in terms the same as those which deal with the variation of settlements, and I do not think that any argument can be based upon them. We must look back to see to what objects ss. 192 and 193 are directed. The argument which has been based on the omission of the words "final" or "absolute" from s. 192 is not, in my opinion, sufficient to enable us to deduce from it an intention on the part of the Legislature to introduce an important alteration in the law.

The law, therefore, stands where it did when *Clarke* v. *Clarke and Lindsay* (3) was decided.

The appeal must be dismissed with costs.

SCRUTTON L.J. I agree. The question is whether words in an Act consolidating the law have the effect of amending the law. The presumption with which one starts is that a consolidating Act is not intended to alter the law. An example of that rule is to be found in *Mitchell* v. *Simpson* (4), in which Fry L.J. said: "The Sheriffs Act, 1887, is a consolidating Act, and does not profess to amend or alter the provisions of the Acts consolidated. Primâ facie, therefore, the same effect ought to be given to its provisions as was given to those of the Act for which it was substituted." It may be, however, that the language of the Act is so clearly different from that of the previous statute as to bring about an alteration in the law, as in *MacConnell* v. *E. Prill & Co.* (5), where Sargant J. said: "No doubt the prima facie

(1) 25 Q. B. D. 183.
(2) [1925] P. 157.
(3) [1911] P. 186.
(4) 25 Q. B. D. 183, 190.
(5) [1916] 2 Ch. 57, 63.

presumption in the case of a consolidating Act, such as the present Act of 1908, is that the Legislature intended to reproduce the existing position, and my first inclination would be to hold that, as under s. 129, sub-s. 3, of the 1862 Act, any notice is sufficient which sufficiently informs shareholders of the intention to act by way of extraordinary resolution. But this prima facie view must yield to plain words to the contrary. And when regard is had, not merely to the very specific language of s. 69 of the present Act, but to the extended operation thereby given to an extraordinary resolution and to the new method of defining it, I think it impossible to escape from the conclusion that the notice of the meeting must not merely indicate but actually specify the intention to pass the resolution as an extraordinary resolution." And there are decisions to the same effect in *Thomas* v. *United Butter Companies of France* (1) and in *Food Controller* v. *Cork.* (2) There is also the well known passage in Lord Herschell's judgment in *Bank of England* v. *Vagliano Brothers.* (3)

If that is the principle to be adopted we find that s. 5 of the Act of 1859 used the words "final decree," and that in spite of the fact that in 1860 a new form of decree nisi was introduced, it was held in *Clarke* v. *Clarke and Lindsay* (4) that the Court had no jurisdiction to inquire into settlements until after the decree for dissolution had been made absolute.

Then came the Judicature (Consolidation) Act, 1925, which in s. 192 left out the word "final" before the word "decree," and it is argued that it must have been intended by that omission to alter the law; but the result would be that if a "decree" for divorce in s. 192 includes a decree nisi, then the Court may make an order for variation of settlements although no decree absolute is ever subsequently made. It would require very clear language in the Act to convince me that any such result was intended. In my judgment the alteration in the language of the section is not

(1) [1909] 2 Ch. 484.
(2) [1923] A. C. 647.
(3) [1891] A. C. 107, 144, 145.
(4) [1911] P. 186.

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so clear as to induce me to think that it was thereby intended to alter the law. For these reasons I think the appeal fails.

SARGANT L.J. I agree.

Appeal dismissed.

Solicitors for appellant: *Lewis & Lewis.*
Solicitors for respondent: *Capron & Capron.*

W. I. C.

C. A. 1927 *June* 14.

[IN THE COURT OF APPEAL.]

WILLIS *v.* WILLIS.

Divorce—Agreement for Separation—Failure of a Term—Custody of Child—Refusal of agreed Person to undertake Custody—Right of Person having Custody to be Party to Separation Deed.

The husband presented a petition against the wife for restitution of conjugal rights. The wife by her answer alleged just cause and prayed for a judicial separation. At the hearing the suit was compromised on terms of settlement which were signed by the parties and made a rule of Court. The terms provided (inter alia) for the execution of a deed of separation to be settled in case of difference by P. and for the custody of one of the children of the marriage by J., the husband's brother. The deed was prepared and was settled by P. J. refused to undertake the custody of the child on the terms contained in the deed, and claimed to be entitled to be made a party to it. Thereupon the husband refused to execute it on the ground that it was an essential term of the agreement between the parties that the custody of the child should be entrusted to J., and that J. having refused to accept the custody, the whole agreement was incapable of being carried out. The wife then took out a summons asking that the husband should be ordered to sign the deed, and the husband took out a summons asking that his petition should be restored to the active list. Bateson J. refused to make any order on the wife's summons, and on the husband's summons directed that his petition should be restored to the list.

On appeal by the wife:—

Held, that the agreement between the parties for a separation was an unconditional and binding agreement, apart altogether from the question whether or not J. accepted the custody of the child; that the custody of the child by J. was merely a subsidiary term; and that the proper course was to discharge the order that the petition should be put in the list for hearing, and to remit the matter to the judge to consider and

deal with the objections, if any, that might be raised on either side to the provisions of the formal deed as settled by P.

Held, also, that J. was not a proper party to the separation deed.

Decision of Bateson J. reversed.

APPEALS from two orders of Bateson J.

On September 7, 1916, Commander A. U. Willis was married to Olive Christine Willis. There were two children of the marriage—namely, Mary Christine Willis, born on December 21, 1917, and Joan Kathleen Willis, born on July 12, 1920.

On February 18, 1926, the husband presented a petition for restitution of conjugal rights against the wife.

On March 31, 1926, the wife filed her answer, in which she alleged that she had just cause for refusing to live and cohabit with the husband and prayed for a judicial separation against him and for the custody of the two children of the marriage.

On October 18, 1926, the husband delivered his reply.

On February 10, 1927, the suit came on for hearing before Hill J., and on the following day, February 11, was compromised on terms of settlement, which were drawn up and signed by the parties to the suit. These terms were comprised under ten heads and, so far as material, were as follows :—

" 1. Deed of separation with usual covenants, all charges to be withdrawn.

2. Custody of the child Mary to be given to Mr. Jack Willis, the father's brother. The said child to remain with the mother at Bushey Heath and to be educated at the school she is now attending.

On the child attaining the age of fourteen years to go to a boarding school to be agreed upon by the father and mother.

3. The custody of the child Joan to be given to the mother.

4. Whilst the children are at a preparatory school both the children shall together spend their holiday with their parents in the following proportions—namely, three-quarters Easter holiday at Mr. Jack Willis's house, one-quarter with mother; one-half summer holiday at Mr. Jack Willis's house and

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one-half of summer holiday with the mother; three-quarters of Christmas holiday at Mr. J. Willis's house and one-quarter with the mother, the mother's proportion to include Christmas Day.

The children to be returned to their mother at the expiration of their stay at Mr. J. Willis's house.

5. Father to have access to both the children at Bushey Heath and to be allowed to take them out for the day six times in the term."

Heads 6–8 provided for the payments to be made by the husband to the wife for the maintenance and education of the children, and for the costs of and incidental to the preparation and execution of the deed.

" 9. In the event of any dispute as to the terms of the deed, the deed to be settled by Mr. Chas. Talbot-Ponsonby on behalf of both parties.

10. Case to go into the reserve list pending the execution of the deed.

These terms to be filed and made a rule of Court."

In pursuance of these terms a separation deed was prepared and was settled by Mr. Talbot-Ponsonby on behalf of both parties.

On May 12, 1927, Messrs. Martyns & Gane, the solicitors for Mr. H. J. Willis (referred to in the terms of settlement as " Mr. Jack Willis "), wrote to the wife's solicitors a letter stating that the deed did not provide a basis on which Mr. H. J. Willis was prepared to undertake the duties and responsibilities he was asked to undertake, but that he was perfectly willing to undertake any duties and responsibilities with regard to the children which both the parents desired him to undertake provided that he considered that the arrangements made were in the best interests of the children themselves, and they further stated that Mr. H. J. Willis ought to be made a party to the deed.

This letter was regarded as an intimation that Mr. H. J. Willis refused to accept the deed as drawn, and the husband thereupon refused to sign it on the ground that an essential term of the agreement could not be carried into effect.

On May 16, the wife took out a summons asking that the husband should be ordered to sign the deed, and the husband on the following day, May 17, took out a summons asking that his petition should be restored to the active list.

On May 23, the two summonses were heard by Bateson J., who made an order on the husband's summons directing that his petition should be restored to the list, but refused to make any order on the wife's summons.

The wife appealed from both these orders. The appeals were heard on June 14, 1927.

W. O. Willis K.C. and the *Hon. Victor Russell* for the wife. The effect of the learned judge's orders in this case is to tear up the terms of settlement agreed upon by the parties and to restore the suit to the list for hearing. He appears to have thought that the refusal of Mr. H. J. Willis to undertake the custody of the child Mary on the terms provided by the draft deed of separation destroyed the whole substratum of the agreement and prevented it from being carried into effect. It is submitted, however, that this is not so, but that the agreement between the parties is still a valid and subsisting agreement, and that the provision as to custody is not an essential but merely a subsidiary term. As the deed has not been executed the Court is still in possession of the case and will direct a proper deed to be executed.

Cotes-Preedy K.C. and *T. Bucknill* for the husband. The main basis of the agreement between the parties in this case was the custody of the children, and if that cannot be carried out the whole agreement fails. This is a case of contract, and where circumstances have arisen which prevent the contract being carried out the parties will not be held to be bound by it: *Ex parte Wheeler* (1); *Taylor* v. *Caldwell* (2); *Horlock* v. *Beal.* (3) Here without any default on the part of the husband his brother, Mr. H. J. Willis, has refused to accept the custody of the child Mary. Under those circumstances

(1) (1817) Buck, 25, 28. (2) (1863) 3 B. & S. 826, 833.
(3) [1916] 1 A. C. 486, 496.

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the contract must be looked upon as wholly dissolved, and the Court cannot take any course which would in reality impose new and additional terms on the parties: *F. A. Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (1) To substitute another person for Mr. H. J. Willis would be to alter the terms of settlement which have been agreed to between the parties. The deed makes no provision for carrying out the provisions of clause 4 of the terms of settlement, and until that has been done the husband ought not to be ordered to execute the deed.

[They also referred to *Brailey* v. *Brailey*. (2)]

LORD HANWORTH M.R. This case raises a somewhat important question, not only for the parties but possibly for many others in a similar position.

The parties were married in 1916, and unhappy differences subsequently arose. In 1926 the husband presented a petition for restitution of conjugal rights. The wife put in an answer justifying on various grounds. In the particulars she gave she made serious charges against her husband, and as to matters connected with the children. It is quite obvious that after the petition and answer serious questions would arise as to the custody of the two children of the marriage, one of whom was ten years old, and the other two and a half years younger.

The case came before Hill J. on February 10 last. He at once saw that it was one which ought to be settled rather than fought out, and an effort was made by counsel, with the result that on February 11 they came to terms of settlement, a minute of which was embodied in an order made on that day, that the terms signed by the two spouses marked A should be embodied in a separation deed, and should be filed and made a rule of Court.

By the terms of settlement it was provided that in the event of any dispute as to the terms of the deed, it should be settled by Mr. Charles Talbot-Ponsonby on behalf of both parties. Mr. Talbot-Ponsonby settled the deed accordingly.

(1) [1916] 2 A. C. 397, 407. (2) [1922] P. 15.

One of the terms of the settlement was that the custody of the elder child should be given to the petitioner's brother, Mr. H. J. Willis, the mother to have the custody of the younger. The term "custody" does not mean actual physical custody, but the right to control. Having regard to the charges that had been made by the wife against the husband, partly with regard to the children, which charges, however, had been withdrawn, it was important that the custody of the elder child should be carefully provided for.

There were a number of other points in the deed which Mr. Talbot-Ponsonby had to determine, including the question whether the money paid for maintenance and education of the children should be paid free of income tax or not. Exception was taken to the deed as drawn up, and Mr. H. J. Willis found himself unable to accept it. On May 13, 1927, his solicitors wrote to the wife's solicitors a letter in which they stated that the deed did not provide a basis on which Mr. H. J. Willis was prepared to undertake the duties and responsibilities which it was suggested he should undertake; he was, however, perfectly willing to undertake any duties or responsibilities with regard to the children, which both the parents desired him to undertake, provided always that he considered that the arrangements made were in the best interests of the children themselves. When that letter was sent it was taken to mean that Mr. H. J. Willis refused to accept the deed as drawn, and that his refusal went to the essence of the settlement, and prevented its terms from being carried out. The husband refused to sign the deed. Thereupon two summonses were taken out, one by the wife on May 16, asking that the husband be ordered to sign the deed, and the other by the husband on May 17, asking that the petition for restitution of conjugal rights should be restored to the active list for hearing. Bateson J., before whom the summonses came on May 23, 1927, refused to make any order on the wife's summons, but made an order on the husband's summons that his petition should be restored to the active list for

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hearing. In each case he gave leave to appeal. From those orders the wife appeals.

The basis of Bateson J.'s decision was this: He accepted the argument, that Mr. H. J. Willis's refusal to accede to the terms of the settlement went to the root of the matter and the whole fabric of the settlement had fallen to the ground. He purported to follow the principle laid down in *F. A. Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (1), where Lord Loreburn said: "But a Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. In applying this rule it is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract."

I do not share Bateson J.'s view. It does not appear to me that the settlement fell to the ground when Mr. H. J. Willis caused the letter of May 13, 1927, to be written. It is necessary to consider the nature of the circumstances. If there was to be a judicial separation there would have to be consequential orders. But the primary issue between the parties, one of whom was petitioning for restitution of conjugal rights, and the other for judicial separation, was separation or no separation. By the terms of the settlement they agreed to execute a deed of separation with all the usual covenants and all charges were to be withdrawn. The importance of an agreement is not to be measured by the length of time taken in reaching it. Mr. Cotes-Preedy has said that the real difficulty which arose was with reference to the custody of the elder child Mary. One has to look at what was the main term of the agreement. There are a number of other clauses, e.g., as to the custody

(1) [1916] 2 A. C. 397, 403.

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and maintenance of the other child Joan, as to which no question arises.

It appears to me on a consideration of the terms of settlement that the deed cannot be considered as inoperative because Mr. H. J. Willis has taken up the attitude he has. The agreement, so far as its general terms are concerned, remains a valid and operative agreement between the parties. I think, therefore, that the wife's appeal on the husband's summons succeeds, and that the order restoring the petition to the list for hearing must be discharged. As to the wife's summons we think that the judge should have made some order on it, and that the case should go back to him to consider what order he ought to make. We do not decide what that order should be. The judge could say, as in *Brailey* v. *Brailey* (1), that a particular covenant was not a usual covenant. That case leaves a discretion in the judge to indicate the form in which the deed should be settled. The result will be that on the case being sent back the judge will be able to direct Mr. Talbot-Ponsonby how he is to deal with the difficulties arising on the deed. The best opinion of conveyancers is that Mr. H. J. Willis ought not to be a party to the separation deed. I hope that when the matter goes back there will be some endeavour to reach a satisfactory settlement, not only in the interests of the parties themselves, but also in those of their children.

SARGANT L.J. I am of the same opinion. I think that the order of Bateson J. was made on the assumption that the arrangement that Mr. H. J. Willis should undertake the custody of the elder child was so vital a matter that his refusal to accept the custody destroyed the substratum on which the document was founded. In my opinion that was not so. The agreement between the parties for separation and withdrawal of charges was an unconditional agreement altogether apart from whether or not Mr. H. J. Willis accepted the custody of the child. And the fact that the agreement was put into writing and signed prevents any subsequent

(1) [1922] P. 15.

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contention that the parties were not ad idem. They were ad idem in agreeing to those written terms, although the working out of the terms in greater detail was left to be dealt with subsequently.

Then afterwards I think that the case was put too high on both sides by the solicitors for the parties concerned. Mr. Bertram Sturt, the wife's solicitor, was too rigid in insisting on the exact words of the written agreement, and the solicitors for the husband and Mr. H. J. Willis were wrong in maintaining that the latter must be a party to the separation deed. In my judgment there was here a perfectly good and effective compromise of the disputes between the parties, and if that were not so, it would be almost impossible for parties who are litigating their rights in the Divorce Division to settle their differences. When parties to a litigation of this kind meet and draw up terms of settlement it is practically impossible to provide for every event which may happen in the future. The main terms are stated, as they were here, and the incidental details are left to be subsequently worked out. The agreement is an executory one, and the function of the draftsman to whom the drafting of the formal deed is entrusted is to draw a deed which shall carry out and execute the general intentions of the parties as expressed in the heads of settlement. He is not limited to reproducing the exact language of the terms of settlement. It is permissible for him in the exercise of the discretion entrusted to him to interpret and expand the heads of settlement, though not to insert anything that cannot fairly be said to be included in or to be intended by those heads. Then if the arbitrator has in the course of framing the deed misinterpreted the heads or included anything in the deed which ought not to be there, the Court can on a proper application correct the interpretation and modify or strike out any clauses which do not accurately carry out the terms, or go beyond them.

In my opinion, the proper course is that indicated by my Lord—namely, to discharge the order that the petition shall be put in the list for hearing, and to remit the matter to the judge to consider and deal with the objections, if any, that

may be raised on either side to the provisions of the formal deed as settled by Mr. Talbot-Ponsonby.

LAWRENCE L.J. I agree. The solution of the problem which has arisen in this case depends upon whether the provision giving the custody of the child Mary to Mr. H. J. Willis is a basic term of the settlement, or is merely a subsidiary term. In my opinion it is the latter. Mr. H. J. Willis was to have the legal custody of the child, but the actual custody was to be that of the mother. Supposing that Mr. H. J. Willis had become ill, or of unsound mind, or had died, could it be said that the whole of the compromise agreement had collapsed? In my opinion it could not. I agree that the matter should be dealt with as indicated by the Master of the Rolls, and that the appeals should be allowed with costs.

Appeals allowed.

Solicitor for wife: *Bertram Sturt.*

Solicitors for husband: *Brown, Turner, Compton, Carr & Co.*

W. I. C.

1927
Oct. 18.

DIVORCE.

FLETCHER *v.* FLETCHER.

Divorce—Practice—Security for Costs—Order of Justices—Wife's Appeal—No Order for Security—Matrimonial Causes Act, 1878 (41 & 42 *Vict. c.* 19), *s.* 4—*Summary Jurisdiction (Separation and Maintenance) Acts,* 1895 (58 & 59 *Vict. c.* 39), *s.* 11, *and* 1925 (15 & 16 *Geo.* 5, *c.* 51)—*Administration of Justice Act,* 1925 (15 & 16 *Geo.* 5, *c.* 28), *s.* 29, *sub-s.* 4; *Sch.* 5—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 103—*Rules of Supreme Court, Order* LIX., *rr.* 4*a*, 16, 17; *Order* LXV., *r.* 6.

The practice sanctioned in *Sirrell* v. *Sirrell* [1911] P. 38 and since followed on appeals to the Divorce Division from courts of summary jurisdiction under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 and 1925, of ordering security for the wife's costs, when the husband has been unsuccessful below and appeals, has no application to the case of a wife, unsuccessful below and appealing.

APPLICATION for security for the costs of a wife appealing from the refusal of justices to make an order on her summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 and 1925.

Appeal from a court of summary jurisdiction. On June 30, 1927, Margaret Fletcher, the wife, complained before the justices of Bury in the county of Lancaster that James Fletcher, her husband, had deserted her. The complaint was dismissed. The same result attended a second summons by the wife heard on July 28, 1927, alleging desertion and wilful neglect to provide reasonable maintenance. On August 15, 1927, the wife gave notice of appeal to the Divisional Court from the dismissal of her summons on July 28, 1927.

The appellant then took out a registrar's summons in this Division calling on the respondent husband to show cause why he should not provide security for the appellant's costs of the appeal.

This summons was referred by the registrar to the judge in chambers (Lord Merrivale P.) and was by him adjourned into Court, the President stating that the application being

for security for the costs of an appeal should have been strictly made to a Divisional Court. (1)

Noel Middleton for the respondent. There is no power in the summary jurisdiction court, to order the respondent husband to pay the costs of the appellant wife of her appeal. She therefore applies to this Court for security for them. By Order LIX., r. 4A, of the Rules of the Supreme Court, the appeal is to be heard by a Divisional Court of this Division. By the Summary Jurisdiction (Married Women) Act, 1895, s. 11, it is provided that the rules which apply to appeals are those made under the Matrimonial Causes Act, 1878, s. 4. That provision was repealed by the Administration of Justice Act, 1925, s. 29, sub-s. 4, and Sch. 5, but the combined effect of the latter statute and the Supreme Court of Judicature (Consolidation) Act, 1925, s. 103, is to continue the procedure in operation at the passing of the Summary Jurisdiction Act, 1895. Order LIX. contains the rules applying to these appeals. Rule 16 is the only rule of possible application and it is quite general, while r. 17 introduces the practice applicable to appeals to the Court of Appeal from the High Court. The practice as to security for costs appears from Order LXV., r. 6, and the notes thereon in the Annual Practice. The net result is that in no ordinary case can security be ordered, the reason in this case being that the security would be ordered, if at all, against a person compelled to litigate, and if the husband succeeds below, he should not be ordered to give security for his wife's costs of appealing. In *Stokes* v. *Stokes* (2) and *Blackledge* v. *Blackledge* (3) the wife obtained no costs of the appeal when the husband appealed and was successful. There is no precedent for her getting security when she herself is appellant. In *Sirrell* v. *Sirrell* (4), when security was ordered, the husband was the appellant, as also in *L.* v. *L.* (5) In *Shufflebotham* v.

(1) As to the practice on an application for security for the wife's costs on an appeal from justices, see *Sirrell* v. *Sirrell* [1911] P. 38.

(2) [1911] P. 195.
(3) [1913] P. 9.
(4) [1911] P. 38.
(5) (1911) 55 Sol. J. 330.

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Shufflebotham (1) Lord Sterndale M.R. on the question of security for the wife's costs of an appeal said: "No ground was alleged for the application. It is not suggested that the husband would be unable to pay these costs. It is said that security should be ordered for the wife's costs in the Court of Appeal upon the same principle as they were ordered in the Divorce Division. That seemed at first an attractive proposition, but counsel has been unable to produce any authority in support of it. The question was one that could have arisen at any time since the passing of the Matrimonial Causes Act, 1857, and in the absence of any precedent of any such order during the long time that had elapsed since that Act was passed the Court ought not to make the order asked for."

The practice of ordering security for a wife's costs in this Division arose originally out of the doctrine of necessaries, and that ought not to extend to the costs of an appeal.

F. S. Laskey for the appellant. The cases cited show that the power exists to order security, although it may not have been exercised in a case where the wife is appellant. The inference to be drawn both from *Sirrell* v. *Sirrell* (2) and *Shufflebotham* v. *Shufflebotham* (1) is that jurisdiction may exist. In *Earnshaw* v. *Earnshaw* (3), referred to in Rayden's Practice and Law in the Divorce Division, 2nd ed., p. 331, the Court was not dealing with a wife's appeal and any dictum on the subject in that case is merely obiter.

THE PRESIDENT (LORD MERRIVALE). The question has been quite properly and naturally raised and well and concisely argued.

The wife, the appellant, took proceedings before justices on the ground of desertion to obtain maintenance and was unsuccessful. As an appellant, she moves under the statute which is now to be read with the Summary Jurisdiction Act, 1895, that the husband may be ordered to give security for her costs of the appeal. In the ordinary jurisdiction of this

(1) [1923] W. N. 51. (2) [1911] P. 38.
(3) [1896] P. 160.

Division as between husband and wife there is an inveterate practice of ancient origin whereby the common law presumption is acted upon that a wife has, prima facie, no means of her own for providing for her necessaries. Out of that common law presumption there arose a practice whereby in this Court, if the wife was a suitor, or if she was a respondent, and if there were no grounds in the relative means of the parties for refusing the order, she obtained an order almost as of course that provision should be made for the conduct on her part of the litigation on which she had embarked.

The real question in the present case is whether the principle which underlies this practice must be held to apply to the appeal to this Division under the Summary Jurisdiction Act of a wife who has been unsuccessful in the Court below. There is no precedent which provides that as a matter of course, or as a matter of discretion, an order for security for costs should be made against the husband in such a case. Until the decision of the Court in *Sirrell* v. *Sirrell* in 1911 there was, as far as I am aware, no decided case in which it was held that the general practice of the Court in respect of security for the costs of a case in which the wife was a suitor must be held to apply in cases of appeal under the Summary Jurisdiction Act, but in *Sirrell* v. *Sirrell* it was held that where a wife has been successful in the court below, if the husband appeals to this Division, the practice of the Division applies to direct him to give security for her proper costs. The decision has been embodied in the practice of the Court and has been followed ever since, and followed, as far as I know, without anything in the nature of objection. It is the everyday practice now that where the wife, who has made application under the Summary Jurisdiction Act, has succeeded below, the husband shall not be allowed to proceed with his appeal without giving security for her costs, but different considerations obviously apply where the wife has been the applicant below and has been unsuccessful. In the first place she is not a suitor in this Court within the ordinary definition of a suitor in the divorce jurisdiction.

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She is a complainant alleging a failure of justice before a bench of justices. Then there is nothing in the statutes which encourages the application. So far as the statutes and the rules of the High Court applicable to common law practice throw any light upon the matter, as Mr. Middleton pointed out, they are on the whole rather opposed to such an application as is made here, because it obviously is an application which could not succeed in an ordinary appeal in the King's Bench Division. The jurisdiction invoked is of the nature of a common law jurisdiction. The practice of the Court of Appeal in respect of appeals from the King's Bench Division, which is incorporated by reference in one of the rules, certainly would not avail to give the wife the security which she seeks here. I should say that that was made conclusively clear in the case of *Shufflebotham* v. *Shufflebotham* (1) which has been referred to. It is a matter of common knowledge that where a wife has been a litigant in this Court and has appealed, although her costs here have been provided for under the general jurisdiction of the Court, if the case goes to the Court of Appeal, the procedure of the Court of Appeal operates. The matter has ceased to be a proceeding in this jurisdiction, to which the old rules of Divorce jurisdiction apply. There is no statutory authority for the order which is sought here. There is no precedent in any decided case and there is nothing in the established practice of the Division which renders it necessary or proper that the order, which is sought in this case, should be made. I must hold that this application is outside the settled practice of the Court under the decision in *Sirrell* v. *Sirrell*, and is not warranted either by statute or by any decided case, and therefore must fail.

I may point out that there are great facilities now under the Poor Persons Rules for poor persons to come into litigation. It is quite open to the wife, if she is eligible, to take proceedings under the Poor Persons Rules. Moreover, if the wife has good grounds for appeal, it may be that the appeal will be a necessary and that the husband is under the common law

(1) [1923] W. N. 51.

liable to the solicitor who takes up the wife's case. That, however, has nothing to do with the jurisdiction or the practice with regard to the wife's costs in this Court.

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Application dismissed.

Solicitors for wife: *Thompson, Quarrell & Attneave, for Pickstone & King, Radcliffe.*

Solicitors for husband: *Gregory Rowcliffe & Co., for Hall & Smith, Bury.*

R. M. M.

DIVORCE.

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Nov. 4.

In the Matter of THE PETITION OF A. B. FOR DISSOLUTION OF MARRIAGE.

Divorce—Practice—Wife's Costs—Security—Admission of Adultery by respondent Wife—Denial by her of Adultery with named Co-respondent—Security ordered to cover such Costs of Wife as Judge at Trial might order Payment of—Payment into Court not ordered.

The respondent wife admitted adultery resulting in the birth of a child, but denied adultery with the only named co-respondent. The Court ordered the petitioning husband to give security for the wife's costs to the extent that a registrar might fix as sufficient to provide for any costs that the husband might be ordered to pay by the judge at the trial.

APPEAL of the husband, the petitioner, from the usual order of a registrar that the husband should pay the respondent wife her taxed costs up to the setting down of the cause and give security for her costs of the hearing.

The petitioner by an amended petition charged the respondent generally and specifically with adultery with a named co-respondent, from whom he claimed damages. By particulars delivered the petitioner stated his reliance in respect of one of the charges, made by him, on the fact that the respondent had given birth to a child. By her answer the respondent denied adultery with the co-respondent and further, admitting that, as alleged, she had given birth to a child, denied that the co-respondent was the father.

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The answer of the co-respondent was a general denial. On the usual application by the respondent, on setting down the cause for trial, for provision of her costs the petitioner contended that the defence was not meritorious, the admission of the birth of a child being tantamount on the facts to an admission of adultery with some man. On this point being taken the registrar called for an affidavit of merits, from which it appeared that the respondent while admitting the birth, as alleged, persisted in her denial of the paternity of the co-respondent and refused to disclose the name of the father save to the Court at the hearing. On this the registrar made the usual order for payment of and security for costs.

The husband appealed.

The judge in chambers (Lord Merrivale P.) adjourned the summons into Court.

F. L. C. Hodson for the husband. The wife practically admits adultery and shows herself to be merely a witness for the co-respondent. No order for security should be made.

H. B. D. Grazebrook for the respondent.

THE PRESIDENT (LORD MERRIVALE). As I have said, the authority of the Court to order an aggrieved husband, or a husband alleging himself to be aggrieved, to secure the costs of a wife who is alleged to be guilty, although it is a most valuable power of the Court in the interests of justice, is exceedingly capable of being oppressively used. I do not say it is being oppressively used in this case, but when I became aware of the circumstances of the case, having in mind what I have said with regard to the possible effects of the jurisdiction, I thought it was desirable that this case should be argued in open Court.

The petitioner alleges the adultery of his wife and says that she has given birth to a child whose paternity he denies. That is as far as he can go, having regard to the decision given some time ago in the House of Lords: *Russell* v. *Russell*. (1) It appears now that the wife does not suggest that he is the father of that child. She says that at the

(1) [1924] A. C. 687.

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The President.

hearing of the cause she will be ready to inform the judge who is the father, but she desires to defend herself against the charge of adultery with the co-respondent. That may well be so. I do not know, and it is not my present business to inquire. The case is a peculiar case. It is not within the class of simple cases, out of which the jurisdiction in the Ecclesiastical Courts grew up, and in respect of which the jurisdiction of this Division was intended to be exercised. It is a class of case which arises out of more complex conditions than those to which the jurisdiction was designed to apply. It has been properly said for the wife: "She is charged with adultery. She denies that she has committed it with the alleged paramour. She wants to defend herself." Although the case is of a peculiar kind, there is something in the nature of a prescriptive right upon cause shown to secure to the wife the means for defence.

I propose to do that in this case, without knowing its merits at present, by accepting the offer which was made on behalf of the husband to give sufficient security for any costs which he may ultimately be ordered to pay, but I do not propose to order a payment into Court. A sum in Court is apt to find its way out of Court in some way or another. I propose to order security. The registrar will fix the proper security, and it will be security for such costs as the judge may order at the trial.

Solicitors for petitioner: *Corbin, Greener & Cook, for Arthur Neal & Co., Sheffield.*

Solicitors for respondent: *Jaques & Co., for E. S. Spencer, East Retford.*

R. M. M.

1927
Oct. 26;
Nov. 7.

PROBATE.

In the Estates of JOHN AND AMELIA GIBBINGS.

Probate—Settled Land—Tenant for Life—Land Settled previously to Death and not by Will of Tenant for Life—Surviving Executor of Settlor—Grant of Probate limited to settled Land of Will of Tenant for Life to surviving Executor of Settlor as Trustee of Settlement—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 1, *sub-ss.* 1, 2, 3; *s.* 2, *sub-ss.* 1, 2; *s.* 3, *sub-ss.* 2, 4; *s.* 22, *sub-ss.* 1, 2; *s.* 55, *sub-s. xxiv.*; *Settled Land Act*, 1925 (15 *Geo.* 5, *c.* 18), *ss.* 7, 30, *sub-ss.* 1, 3—*Non-Contentious Probate Rules* 116, 118.

A settlor, who died in 1890, by his will appointed as executors his wife and his son. By his will he devised land to them on trust for his wife for life, and subject thereto in trust for his children in such shares as his wife should by deed or will appoint. By successive deeds and her will she appointed to the children equally. She died in 1926, and her executor took general probate of her will, "save and except" the settled land:—

Held, that her co-executor of the will of the settlor as trustee of the settlement was entitled to a grant of probate of her will limited to the settled land by virtue of the Administration of Estates Act, 1925, s. 22, as her special executor.

John Gibbings, who died on December 20, 1890, appointed as executors his wife Amelia Gibbings and his son Frederick John Gibbings, and devised real estate to them, their heirs executors and administrators upon trust to permit his wife to receive the income thereof for her life and subject thereto for his children in such shares as his wife should by deed or will appoint. Amelia Gibbings took probate in the first instance and double probate was afterwards granted to Frederick John Gibbings. Amelia Gibbings by successive deeds and her will appointed the property to her children in equal shares. Amelia Gibbings, who died on April 20, 1926, appointed her son Charles Edwin Gibbings sole executor and he took probate of her will "save and except settled land." Frederick John Gibbings, who was resident out of the jurisdiction, on March 29, 1927, appointed attorneys to obtain for him as special executor a grant of probate of the will of Amelia Gibbings limited to the settled land, and on the same date appointed Charles Edwin Gibbings as an

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additional trustee along with himself of the settlement created by the will of John Gibbings. Frederick John Gibbings and Charles Edwin Gibbings thereupon proceeded to enter into contracts of sale of the settled land. Meanwhile on application in the principal registry in common form by the attorneys for a grant of probate on the basis of Frederick John Gibbings being entitled, as special executor of Amelia Gibbings, the deputy registrar refused the application on the ground that according to the practice hitherto prevailing the case did not fall within the class of grants to special executors. Frederick John Gibbings then applied to the Court for a grant, and on August 23, 1927, on the application coming on before Clauson J. (sitting as vacation judge), it was adjourned to be dealt with on motion to this Division.

R. M. Middleton for the applicants now moved accordingly. (1)

Cur. adv. vult.

Nov. 7. THE PRESIDENT (LORD MERRIVALE) [having stated the facts and referred to Non-Contentious Probate Rules 116 and 118 :] The governing sections of the Administration of Estates Act, 1925, are ss. 1 and 22. Sect. 1 (so far as is material) is in these terms :—

" 1. (1.) Real estate, to which a deceased person was entitled for an interest not ceasing on his death, shall, on his death . . . . devolve . . . . on the personal representative of the deceased. . . . .

(2.) The personal representatives for the time being of a deceased person, are deemed in law his heirs and assigns within the meaning of all trusts and powers.

(3.) The personal representatives shall be the representative of the deceased in regard to his real estate to which he was entitled for an interest not ceasing on his death as well as in regard to his personal estate."

Sect. 22, sub-s. 1, is in these words : " A testator may appoint, and in default of such express appointment shall be deemed to have appointed, as his special executors in regard

(1) The various statutes and rules applicable were referred to by counsel, but are not set out, being dealt with in the judgment.

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to settled land, the persons, if any, who are at his death the trustees of the settlement thereof, and probate may be granted to such trustees specially limited to the settled land. In this sub-section 'settled land' means land vested in the testator which was settled previously to his death and not by his will." Sub-s. 2: "A testator may appoint other persons either with or without such trustees as aforesaid or any of them to be his general executors in regard to his other property and assets."

Sect. 2, sub-s. 1, and s. 3, sub-s. 4, of the same Act are of interest, and have been considered by those who are advising the persons concerned. Sect. 3, sub-s. 4, which I will mention later, touches the origin and quantum of the interest of the applicant in the lands in question.

"Settled land" and "settlement," as the terms are used in the Administration of Estates Act, 1925, have, by virtue of s. 55 (xxiv.), of that Act, the same meaning as in the Settled Land Act, 1925. Reference to the sections will show, as might be expected, that the will of John Gibbings was a "settlement" and that the land in question is "settled land." Sect. 7 of the Settled Land Act, 1925, provides for the devolution of settled land on the death of the tenant for life. Sect. 30, sub-s. 1, specifies various classes of persons who are trustees of a settlement for the purposes of the Act, and in conjunction with other sections imposes obligations and provides for the exercise of powers in modes which clearly are intended to simplify the business of dealing with settled land. I do not discuss them here, because I have not to define the rights and powers which a special executor acquires in respect of settled land, or which the law will confer in the present case, if the grant which is sought is made. I do not, however, find in the Settled Land Act, 1925, any sections which bear directly upon the enactment in the Administration of Estates Act, 1925, whereby that statute provides for a limited grant of probate in respect of settled land to a special executor. What is to be done is to ascertain whether the applicant is included in the class of persons to whom such a grant is to be made.

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The difficulty which has arisen in the registry springs from a view which has been taken of the effect of the Settled Land Act, 1925, s. 30, sub-s. 1, which specifies the classes of persons who are trustees of a settlement under that Act. Heretofore grants to special executors have been confined to applicants falling within the classes so defined in s. 30, sub-s. 1, whose qualifications in that respect existed at the death of the tenant for life. Other persons interested, including persons who become qualified to satisfy the conditions of s. 30, sub-s. 1, after the death of the tenant for life, have had made to them the grant of administration with the will annexed—upon clearing off special executors.

Sect. 30, sub-s. 1, of the Settled Land Act, 1925, does not, in my judgment, limit the operation of the Administration of Estates Act, 1925, ss. 1 and 22, so as to exclude the present applicant. It does not purport to do so, and s. 30, sub-s. 3, appears to me to point to his inclusion. There is no doubt an important inter-connection in the two statutes, and a link between them exists of which s. 22 of the Administration of Estates Act, 1925, is a conspicuous instance.

Now, the operation of the Administration of Estates Act ought not on the one hand to be limited by implication from outside its contents or on the other to be extended beyond its clear intention. As to the latter consideration, in applying the provisions of the Act on a previous occasion, I pointed out (1) that, apart from statute, an executor is appointed only to dispose of "the substance of the testator."

Sect. 1 of the Administration of Estates Act, 1925, which substituted the personal representative for the heir at law as the immediate successor of the deceased person in respect of real estate, applies—so far as real estate is concerned—only to real estate to which the deceased was "entitled for an interest not ceasing on his death." So when s. 22 provides for the appointment of special executors in regard to settled land it prima facie deals with settled land as to which some representative of the deceased must be appointed to discharge functions theretofore exercised by

(1) Pickering deceased. On motion, July 13, 1927 (unreported).

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the deceased. Accordingly if the realty here in question was realty to which Amelia Gibbings was entitled for an interest not ceasing on her death the applicant is clearly within the provisions of this statute.

Sect. 3, sub-s. 4, of the Administration of Estates Act, 1925, which provides for the case of "a joint tenancy when another tenant survives the deceased," lays down that in such a case "the interest of a deceased person" . . . . "is an interest ceasing on his death," but when regard is had to other parts of the section, as, for example, sub-s. 2, and to the general tenor of the Act, it seems to me that sub-s. 4 is not intended to apply to realty vested in this testator for an estate in fee upon trusts which continue operative after the testator's death, to which s. 22 applies. This being so, the applicant is entitled under the combined effect of ss. 1 and 22 as a special executor to a grant of probate limited to the realty in question, he being trustee of the settlement of realty to which the deceased was entitled for an interest not ceasing on her death.

The grant will issue as a grant pursuant to the Administration of Estates Act, 1925, s. 22, limited to the settled land described in the affidavit used at the hearing to which the deceased was entitled for an interest not ceasing on her death.

I should have been glad to make an order in unqualified terms, but the matter is not simple. I have necessarily not had the advantage of hearing arguments, and interests so great depend upon cautious exercise of the jurisdiction to grant probate and administration that no justifiable safeguard can properly be omitted.

Solicitors: *Torr & Co.*

R. M. M.

ADMIRALTY.

1927
Oct. 24, 25;
Nov. 18.

THE RIVERMAN.

Shipping—Towage—Contract of Indemnity—Application when several Craft in Tow—"Persons interested"—Costs.

F. & Co., a firm of river carriers, hired a barge from H. for a period of twelve months. While on hire, the barge, which was being towed with five others belonging to various owners by a tug owned by the defendants, through the negligent navigation of the tug came into collision with the plaintiffs' barge and damaged her. The defendants admitted liability, but claimed to be indemnified either by H. or F. & Co., or by both of them, under the conditions of the terms of towage.

The first term was "that on the hiring or employment of the steam tug the master and crew thereof shall be held to become the servants of and identified with the vessel or craft being towed, and under the control of the person in charge of such vessel or craft during the performance of the contract."

The next sentence, a long one, was in two parts; the first, an exception clause relieving the tug owners from responsibility for various acts, neglects and defaults, ended with a semicolon, and continued as follows: "and the owners or persons interested in the vessels or craft so being towed . . . . shall and do undertake to bear, satisfy and indemnify the steam tug owners against all liability for the above mentioned matters and against all costs and charges in respect of any law expenses or actions that may arise or be brought against the said tug owners in relation to any such loss or damage, actual or alleged."

On the facts, the Court found that the contract with the defendants to tow the barge was made on behalf of F. & Co. only:—

Held, that although the first sentence of the conditions of towage might be inapplicable to a case where more than one barge was in tow, it did not follow that the remainder was inapplicable; that F. & Co. were "persons interested" in the craft being towed; and that the conditions imposed upon them an obligation to indemnify the defendants.

Held, further, that, under the indemnity for costs, the defendants, so far as their own costs against the plaintiffs were concerned, were entitled to costs as between solicitor and client.

Action against third parties for an indemnity.

On January 6, 1927, the wooden keel *Elma*, lying at anchor in the River Trent, was run into by the keel *Blenheim*, the fourth craft of six in tow of the steam tug *Riverman* belonging to the United Towing Company, Ld. An action was brought by the owners of the *Elma* against the owners of the *Riverman*, and on July 13, 1927, the defendants admitted

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liability. They alleged, however, that the *Blenheim* was being towed upon the terms that her owner or the "persons interested" in her should indemnify the tug owners against liability for damage caused to other craft, and by a third party notice filed on April 30, 1927, they claimed an indemnity from the owner of the *Blenheim*, Herbert Hinchsliff.

By his defence, the third party, Hinchsliff, alleged that at the time of the collision the *Blenheim* was let on hire to Furley & Co., Ld., river carriers of Hull, under written agreement of August 16, 1926; that at the time of the collision he was acting as master of the *Blenheim* and was the servant of Furley & Co.; and that the *Riverman* was towing the *Blenheim* under a contract made between the defendants and Furley & Co. Thereupon the defendants joined Furley & Co. as third parties. These third parties denied that the defendants were entitled to the indemnity claimed, and alleged (inter alia) that they hired the *Blenheim* under an agreement which provided that her owner should be liable for all damage done by the vessel through collision or negligent navigation.

The conditions of towage on which the defendants relied for the indemnity were printed at the head of their tariff and towage rates and at the head of their accounts. They were in the following terms:—

"NOTICE is hereby given that the above United Towing Co., Ld., will tow vessels or craft by their own or other steam tugs on the following conditions only, viz.:—

"That on the hiring or employment of the steam tug, the master and crew thereof shall be held to become the servants of and identified with the vessel or craft being towed, and under the control of the person in charge of such vessel or craft during the performance of the contract. The steam tug owners are not responsible for the acts, neglect, or default of the masters, pilots or crews of the steam tugs . . . . or other persons in their employment, or for any loss of life or injury to persons or for any damage or loss that may arise to any vessel or craft being towed, or about to be towed, or having been towed, or cargo on board of same, or any other ship or cargo, or any pier, wharf or other property through collision

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or otherwise, whether such damage arise from or be occasioned by any accident, or by any omission, breach of duty, mismanagement, negligence, or default of the steam tug owners, or any of their servants or employees, or by any defect or imperfection in the steam tugs or their machinery . . . . or from any delay, stoppage, swiftness or slackness of speed, however occasioned, ... or for any of the consequences of the causes above excepted; and the owners or persons interested in the vessels or craft so being towed, or about to be towed, or having been towed, or the cargo on board of the same, shall and do undertake to bear, satisfy and indemnify the steam tug owners against all liability for the above mentioned matters and against all costs and charges in respect of any law expenses or actions that may arise or be brought against the said tug owners in relation to any such loss or damage, actual or alleged. The acceptance, hiring, or employing of a steam tug is not to prejudice any claim the steam tug owners may have to salvage remuneration for any extraordinary services that may be rendered to the ship or cargo from or arising out of circumstances not existing or contemplated at the time of such acceptance, hiring or employment. . . . . "

Langton K.C. and *Brightman* for the defendants.

Dunlop K.C. and *Balloch* for the third party, Herbert Hinchsliff.

E. A. Digby K.C. and *Stranger* for the third parties, Furley & Co.

[It was argued on behalf of the third parties that the towage conditions did not in clear and unambiguous terms impose a liability to indemnify, inasmuch as the conditions were inapplicable where more than one craft was in tow—e.g., the master could not be the servant of six different owners at one and the same time. Further, so far as Furley & Co. were concerned, they were not " persons interested." Where the tug owners intended any of the conditions to apply to charterers they did so expressly, as in the clause relating to salvage, where the word " hiring " was used.]

Cur. adv. vult.

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Nov. 18. HILL J. read the following judgment :—

On January 6, 1927, the keel *Blenheim*, which was in tow of the defendants' tug *Riverman*, was in collision with the plaintiffs' keel *Elma*. The collision was caused by the negligence of the defendants' servants in charge of the tug. The defendants were sued by the owners of the *Elma* and her master, and have admitted liability. The defendants allege that they are entitled to be indemnified either by the third party, Mr. Hinchsliff, who was the owner of the *Blenheim*, or by Furley & Co., for whom the *Blenheim* was working under an agreement between Hinchsliff and Furley & Co., Ld., or by both.

The defendants set out to prove a contract of indemnity. The questions are : (1.) Had they a contract with Hinchsliff ? (2.) Had they a contract with Furley & Co. ? (3.) Did that contract contain a term that the party contracting with the defendants should indemnify the defendants against liabilities to the plaintiffs incurred by reason of the negligence of the defendants' servants in charge of the tug *Riverman* while towing the *Blenheim* ?

It is of course for the defendants to prove a contract, and to show that, in clear and unambiguous terms, it shifts on to the other contracting party a liability which otherwise would rest upon the defendants alone. There is no question that there was a contract that the tug should tow the *Blenheim*. With whom was it made ? Furley & Co., Ld., carried on business as river and canal carriers and forwarding agents. They owned a number of keels or barges; they hired others. Inter alia by an agreement dated August 16, 1926, and made between themselves and Hinchsliff, they hired the *Blenheim* for twelve months. From time to time they furnished the defendants with a list of the " boats owned and hired by them." There was an arrangement, current at the material times, between the defendants and Furley & Co., that in respect of towages of all such boats the defendants should debit Furley & Co., render accounts to Furley & Co., and be paid by Furley & Co. The *Blenheim* is among the boats in the accounts so rendered and paid in respect of towages in August,

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September, October, November and December, 1926, and also in an account rendered on February 14, 1927, and paid on March 25 in respect of January, 1927, towages, which include the towage of the *Blenheim* on January 6, 1927. The voyage on January 6, 1927, was from Hull to Gainsborough, from the dock in Hull. The defendants' managing director, who was called, was unable to say how the order for this particular towage was given. He said that in the ordinary course of business orders were given by telephone from the office of Furley & Co., or by the master of the craft calling at the defendants' office, or by the defendants' manager at the dock, who saw that a boat was ready, applying to Furley & Co. or to the master, and receiving an order. No other evidence was called by the defendants. Mr. Hinchsliff was called on his own behalf. He said that he did not give the order on January 6, 1927 ; he loaded and went to Furley & Co.'s office and obtained a bill of lading, and that they rang up the defendants and told them that the *Blenheim* was for Gainsborough. I disregard that as evidence against Furley & Co., but it is evidence that Hinchsliff did not give the order. Mr. Beaver, a director of Furley & Co., was called, and said that he had no knowledge as to how the particular order on January 6, 1927, was given. I find that the order was not given by Hinchsliff. But it undoubtedly reached the defendants, and was accepted and carried out, and Furley & Co. were debited with the charge for the work done and paid it.

I find therefore that, immediately, Hinchsliff was no party to the contract. I find also that, immediately, Furley & Co. were parties to the contract. It is, I think, a necessary conclusion from the facts already stated that Furley & Co. contracted as principals and not merely as agents for Hinchsliff. It was submitted for Furley & Co., but not strenuously argued, that Hinchsliff was liable, and I must therefore consider whether there is any ground for saying that Furley & Co. contracted on behalf of themselves and Hinchsliff. Hinchsliff gave no express authority to contract on his behalf. If authority there was it must be extracted from the agreement between Hinchsliff and Furley & Co. This contract is with

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Hinchsliff as owner of the *Blenheim*, and also provides for the part to be played by Hinchsliff as master. As owner he lets the *Blenheim* for twelve months, and undertakes to keep her in repair and at the disposal and under the control of Furley & Co. and to carry cargo within certain areas as ordered by Furley & Co.; and the agreement provides that Furley & Co. shall pay hire at the rate of 155*l.* per annum, which shall be the owner's sole remuneration, and that in certain events Hinchsliff, as owner, shall discharge himself as master and appoint a fresh master. As master the Hinchsliff contract is this: "the Captain . . . . shall work her on the thirds system usual and customary in the trade, and that the rate of freight shall be the usual and current rate of freight at the present time paid by the hirers on similar cargoes." This requires some explanation. Furley & Co. received the freights. They did not account for them to Hinchsliff. They took a fixed rate of freight, as provided by the agreement, and multiplied it by the amount of cargo and debited themselves with that. Against the amount so ascertained they credited themselves with brokerage, bill of lading stamp, advances to the master for the ordinary working expenses of the voyage and the amount due for towage. The balance was divided. One-third went to Furley & Co. and two-thirds to Hinchsliff as master, and the master paid the crew—that is, the mate. In view of these facts it cannot be said that Hinchsliff was a partner of Furley & Co. in the running of the ship. He did not share in the profits. Nothing at all was said about the losses. He received two-thirds of a sum ascertained at fixed rates less certain deductions. It was a method of ascertaining his remuneration varying with the work done. I therefore cannot hold that the contract made by Furley & Co. was made for themselves and Hinchsliff. It was made for Furley & Co. only.

Did Furley & Co.'s contract with the defendants contain the indemnity clause relied on? The defendants printed at the head of a printed tariff of towage rates, which they circulated to their customers, a notice that they would tow vessels on the following conditions only, setting out the terms.

They say that they sent this document to Furley & Co., and it is highly probable that they did so. The defendants also printed at the head of all the accounts rendered to Furley & Co. a notice in the same terms. Furley & Co.'s manager said that they knew that the words so printed contained conditions, and that they had tried to understand them. When Furley & Co. bespoke the services of a tug to tow the *Blenheim* they were offering to enter into a contract at the rate mentioned in the defendants' tariff, and on the terms which the defendants had said were the only terms upon which they would tow. That offer was accepted by the defendants sending the *Riverman*. I therefore hold that the contract must be construed as incorporating those terms.

The next question is, Did those terms, in clear and unambiguous language, impose upon Furley & Co., as the contracting parties, the obligation to indemnify the defendants? It is said that the first sentence of the conditions is quite inapplicable to the case where more than one ship is in tow. That may be so. But because that sentence is inapplicable it does not follow that the remainder is inapplicable. The next sentence is a very long one, and is in two parts—the first part is an exception clause; it closes with a semicolon. Then follows an indemnity clause: "and the owners or persons interested in the vessels or craft so being towed, or about to be towed, or having been towed, or the cargo on board of the same, shall and do undertake to bear, satisfy and indemnify the steam tug owners against all liability for the above mentioned matters and against all costs and charges," etc. The "above mentioned matters" are the matters mentioned in the exception clause, and include damage to tug or ship or other property through collision, whether occasioned by the negligence of the servants of the tug owners or otherwise.

Furley & Co. were not the owners of the *Blenheim*, but when they, being hirers of the *Blenheim*, entered into a contract for her towage, they were persons interested in the *Blenheim*, at least for the period of the performance of this contract. I therefore hold that they entered into the contract of indemnity.

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In the pleadings it is alleged that it was a term of the agreement between Hinchsliff and Furley & Co. that Hinchsliff should be liable for all damage done by the *Blenheim*. This is irrelevant to the question I have to decide; and as to whether Furley & Co. have any claim against Hinchsliff I say nothing. Nothing was said in argument, also, on the point raised in the pleadings as to the plaintiffs' right being only for a partial indemnity on the ground that it ought to be split up among the owners of the six craft in tow. There is nothing in that, and I am not surprised that it was not seriously raised. If Furley & Co. contracted to indemnify, they contracted to indemnify, whatever other persons contracted to do. Of course the defendants could not be indemnified twice over. The result is there will be judgment for Hinchsliff against the defendants with costs, and judgment for the defendants against Furley & Co. with costs.

Brightman. The indemnity covers "all costs" of actions brought against the tug owners. The defendants, therefore, are entitled to solicitor and client costs in respect of their own costs in the action brought against them by the plaintiffs.

HILL J. Yes. I think that must be so.

Solicitors for the defendants: *Botterell & Roche, for Sanderson & Co., Hull.*

Solicitors for the third party, Hinchsliff: *Stokes & Stokes, for Hearfield & Lambert, Hull.*

Solicitors for the third party, Furley & Co.: *Cunliffe, Blake & Mossman, for Moss, Lowe & Co., Hull.*

E. C. M. T.

[IN THE COURT OF APPEAL.]

C. A. 1927 Dec. 8.

THE W. H. RANDALL.

Shipping—Practice—Joinder of Parties—Joinder after Admission of Liability—Costs—Discretion—R. S. C., Order XVI., *r.* 11.

The plaintiffs' barges, lying in barge roads, were damaged by being run into by the sailing barge *W. H. R.* shortly after she had been in collision with the steamship *A.* The owners of the *W. H. R.* commenced proceedings against the owners of the *A.* in respect of the damage to the *W. H. R.*, but both the *W. H. R.* and the *A.* threw the blame on each other when written to by the plaintiffs in respect of the damage to the barges. Accordingly, the plaintiffs issued a writ against the owners of the *W. H. R.* and obtained an undertaking for bail. A few weeks later the owners of the *A.* admitted liability both for the collision with the *W. H. R.* and for the collision with the barges, but they declined to pay the costs of the plaintiffs' action against the owners of the *W. H. R.* on the ground that, as there was no doubt that either the *A.* or the *W. H. R.* was liable, the plaintiffs ought to have waited to abide the result of the litigation between the respective owners of the *W. H. R.* and the *A.* To get their costs, therefore, the plaintiffs obtained an order from the assistant registrar adding the owners of the *A.* as defendants to the action already instituted against the owners of the *W. H. R.*

On appeal Hill J. reversed the order:—

Held (Scrutton L.J. dissenting), that the order striking out the owners of the *A.* as defendants was a misuse of the discretion of the Court; that the presence of the owners of the *A.* as defendants was necessary for the purpose of doing justice; and that the case came within the principle laid down in Order XVI., r. 11, that no cause should be defeated by the non-joinder of parties.

Per Scrutton L.J.: That the matter was entirely within the discretion of the judge; but, for the guidance of practitioners in the Admiralty Court, that the proper course to pursue when each of the proposed defendants put the blame on the other, was to follow the common law rule and at once join them both as defendants.

Order of Hill J. reversed.

APPEAL from an order of Hill J. in chambers striking out the owners of the steamship *Anjou* as defendants in an action of damage by collision.

The plaintiffs, Charles Hay & Son, Ld., were the owners of a number of barges moored in the barge roads in the Lower Pool, River Thames. On May 11, 1927, the barges were run into and damaged by the sailing barge *W. H. Randall*

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which shortly before had been in collision with the steamship *Anjou*. The plaintiffs wrote to the solicitors representing the *W. H. Randall*, and they replied on May 16 agreeing to accept service and give the usual undertaking for bail, but adding: "We would point out that there is no necessity for you to commence proceedings as clearly the owners of the *Anjou* or our clients are liable to your clients, and we have commenced proceedings against the steamship which will be proceeded with with all expedition. We contend there was no negligence on the part of our clients' barge, and that the steamship was alone to blame." Thereupon the plaintiffs' solicitors wrote to Messrs. Crump & Son, the solicitors representing the *Anjou*, to know if their clients admitted liability. On May 17 Messrs. Crump replied that there appeared to be "no question as to the liability of the *W. H. Randall* for the collision," and that they could not advise their clients to admit liability for the collision with the barges. Accordingly, on May 19 the plaintiffs issued a writ against the owners of the *W. H. Randall* and obtained an undertaking to enter appearance and put in bail. On June 22 the plaintiffs filed their preliminary act. On July 1 the owners of the *Anjou* admitted liability, and on July 13 the claim of the plaintiffs was agreed at the sum of 140*l*. In addition the owners of the *Anjou* were prepared to allow the costs of proving the claim, but refused to pay the costs of the action against the *W. H. Randall*. To obtain an order for their costs, therefore, the plaintiffs applied to the assistant registrar for an order adding the owners of the *Anjou* as defendants in the action. The assistant registrar made the order and the owners of the *Anjou* entered an appearance under protest and appealed to Hill J. in chambers. His Lordship reversed the order of the assistant registrar and the plaintiffs appealed.

Dunlop K.C. and *R. F. Hayward* for the appellants. The case raises important questions and it is desirable that guiding principles should be laid down. The usual rule in Admiralty is for the plaintiff in the first instance to sue the

owners of the vessel which did the damage ; and it was reasonable for the plaintiffs in this case to sue the owners of the *W. H. Randall*, but it became necessary to add the owners of the *Anjou* when they disputed their liability for costs. The plaintiffs have no other means of recovering these costs ; they do not arise through breach of contract, as in *Hammond & Co.* v. *Bussey* (1), and the plaintiffs cannot recover them as damages. The general rule as to costs in Admiralty cases where there are two or more defendants has been discussed in many cases, and it is well established that the unsuccessful defendant has to bear both sets of costs : see, e.g., *The Svein Jarl* (2) and the cases there cited ; but the question cannot be discussed at all unless the owners of the *Anjou* are parties to the action.

G. St. C. Pilcher for the respondents. The learned judge, having regard to all the circumstances, rightly exercised his discretion, and the question of the joinder of parties under Order XVI., r. 11, is entirely one in the discretion of the judge. The plaintiffs acted unreasonably, they should have stood by and not have incurred the expense of suing the owners of the *W. H. Randall.* When, in fact, the assistant registrar made the order joining the owners of the *Anjou* as defendants, he had no power to make the order, for there was then no dispute between the parties ; the owners of the *Anjou* had agreed the amount of the plaintiffs' damages and had further agreed to pay the reasonable costs of proving the claim.

Dunlop K.C. in reply. If it be a matter of discretion it was the discretion of the assistant registrar and not of the judge. But it is not a question of discretion. Under Order XVI., r. 11, a cause must not be defeated merely by reason of the non-joinder of parties.

SCRUTTON L.J. Speaking for myself, I should dismiss this appeal, because I think the matter of joinder of parties or joinder of causes of action is a matter for the discretion of the judge, and I can see no principle of law which is violated

(1) (1887) 20 Q. B. D. 79. (2) (1923) 16 Asp. M. L. C. 159.

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by the order made by the judge in this case. I myself have always been prepared to follow the rule which I understand was laid down by this Court in 1917 after the alteration of Order XVI. This Order was originally very limited as to plaintiffs and defendants and causes of action. It was altered in very wide terms before 1917, and in that year in *Thomas* v. *Moore* (1) Pickford L.J., giving the first judgment of the Court of Appeal, said: "Whatever the law may have been at the time when *Smurthwaite* v. *Hannay* (2) was decided, joinder of parties and joinder of causes of action are discretionary in this sense, that, if they are joined, there is no absolute right to have them struck out, but it is discretionary in the Court to do so if it thinks right." It seems to me that this matter was so entirely within the discretion of the judge that I should not therefore interfere on that ground. Mr. Dunlop apparently thought that unless he could raise some matter of principle the question was rather one of discretion, and so he asked for guidance. If I could give the Admiralty Court any guidance I should say it would be better for it to follow the practice of the King's Bench Division, which is that when each of two proposed defendants puts the liability on the other party, a writ may then be issued at once against both of them. In this case the plaintiffs were told by letter months before they applied to join the owners of the *Anjou* that each of the proposed defendants put the liability on the other party, and they should in my opinion have issued a writ joining the two defendants. That would have avoided the difficulty in this case, and would also have avoided the risk of not getting bail in respect of a foreign ship.

My brothers, however, think they can alter the order of the judge without interfering with his discretion, and they will indicate how that is to be done.

ATKIN L.J. I am sorry to differ from my Lord on this matter, which involves quite a small sum of money. At the same time I think it affects important rights of the plaintiffs

(1) [1918] 1 K. B. 555, 565. (2) [1894] A. C. 494.

which it appears to me they are entitled to assert. [His Lordship stated the facts and continued as follows :]

The owners of the *Anjou* certainly cannot complain of the plaintiffs issuing their writ against the owners of the *W. H. Randall* in view of the letter written on behalf of the owners of the *Anjou* in which it was said that there appeared to be no question of the liability of the *W. H. Randall* for the collision. If the plaintiffs had done that which seems to me to be the ordinary practice on the common law side they would have joined the *W. H. Randall* and the *Anjou* as defendants, and the *Anjou* would have incurred costs at once by reason of the issue of the writ and having to give bail and so forth.

Proceedings go on to a stage at which the *Anjou* admits liability, and thereupon the plaintiffs seek to have the *Anjou* pay their costs. The attitude which the owners of the *Anjou* take up is this : " It is true that if you had sued us in June, and had done so by the original writ and made us parties from the beginning, we should have had no answer to the claim, and should have had to pay you the costs of the action, including the costs you had to pay to the owners of the *W. H. Randall ;* but, because you did not make us parties until October, although you might have done so in June, we escape that liability."

I have no doubt that the proper order, if the action had been properly constituted, would have been an order which would have protected the plaintiffs in respect of the costs of the action they had quite reasonably brought against the *W. H. Randall.* It appears to me quite impossible to suggest that the plaintiffs are bound to stand by while third parties discuss the question as to who is responsible for the damage to the plaintiffs. The plaintiffs are entitled from the beginning to control that part of the litigation and to take steps, by the proper legal procedure, to see that they will be compensated as soon as they can be. In my opinion, therefore, the plaintiffs had a right to have the owners of the *Anjou* added for the purpose of getting an order for costs, and it would appear that the only way to get that

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order is by making the owners of the *Anjou* parties to the action already commenced against the owners of the *W. H. Randall.*

We have been referred to *The Svein Jarl* (1), where there were two actions, and Hill J. gave the plaintiffs in the one action the costs they had incurred in the second. But in that case there were special facts; and in the absence of very special circumstances I am not satisfied that such an order can be made. The proper course is to join both parties in the alternative in one action. If that is right, ought not the owners of the *Anjou* to be joined for the purpose of enabling the plaintiffs to assert the right to an order for costs against them? I think the owners of the *Anjou* ought to be joined. I think the principle comes within that laid down in Order XVI., r. 11: "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties," and while it is quite true that this is not a question of original liability but of liability for costs incurred by reason of the conduct of the defendants, I think it comes within the same principle. If so, there is no doubt it would be a misuse of the discretion of the Court to refuse to allow a party to exercise that right. In *Van Gelder Apsimon & Co.* v. *Sowerby Bridge United District Flour Society* (2) there was a defect in the action by reason of the mortgagee not being added. But, as was said by Bowen L.J.: "If he (the judge) thought that the defect could be cured by adding the mortgagee as a defendant, I then am strongly of opinion that it was his bounden duty to add him under Order XVI., r. 11; for it is of the essence of the procedure since the Judicature Act to take care that an action shall not be defeated by the non-joinder of right parties; and if the judge sees that a mortgagee's presence is necessary for the purpose of doing justice, he ought not to allow the action to be defeated, but to order him to be made a defendant."

In this case it seems to me that the presence of the *Anjou* is necessary for the purpose of doing justice, and in these circumstances I think the learned judge was wrong in

(1) 16 Asp. M. L. C. 159. (2) (1890) 44 Ch. D. 374, 394.

interfering with the discretion, indeed the duty, of the assistant registrar. The result is that the appeal will be allowed and the owners of the *Anjou* must be added as defendants. Subject to what my brother says I think the costs here and below should be costs in the cause.

EVE J. I arrive at the same conclusion as Atkin L.J. It appears to me that we must read r. 11 as a whole. So read it is obvious that its object was to prevent a multitude of actions or any injustice by reason of non-joinder of parties. When one comes to investigate the facts of the case it appears that there is a matter on which the plaintiffs are entitled to have the decision of the Court; and it is quite obvious that decision cannot be arrived at in these proceedings in the absence of the owners of the *Anjou*. In these circumstances a state of things has arisen which I think entitled the plaintiffs to have these defendants added. If that position be right, the plaintiffs, in my opinion, are entitled to have the order joining the owners of the *Anjou* restored. I agree with the suggestion which has been made by Atkin L.J. as to the way in which the costs should be dealt with.

Appeal allowed.

Solicitors for the appellants: *Keene & Co.*
Solicitors for the respondents: *Wm. A. Crump & Son.*

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THE ROYAL STAR.

Shipping—Right of appeal from Court of Inquiry—Master censured, but Certificate not dealt with—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 475, 478—*Merchant Shipping Act*, 1906 (6 *Edw.* 7, *c.* 48), *s.* 66.

By s. 475 of the Merchant Shipping Act, 1894, where an inquiry into the conduct of a master, mate, or engineer has been held in England, and "a decision has been given with respect to the cancelling or suspension of the certificate" of such officer, an appeal lies to the Admiralty Division of the High Court.

By s. 478, which deals with Colonial Courts of Inquiry, an appeal lies "from any order or finding of the Court," except "(*b*) from a decision affecting the certificate of a master, mate, or engineer, if that certificate has not been granted either in the United Kingdom or in a British possession. . . ."

By s. 66 of the Merchant Shipping Act, 1906: "Where on any investigation or inquiry under the provisions of Part VI. of the principal Act [the Act of 1894] the Court find that a shipping casualty has been caused or contributed to by the wrongful act or default of any person, and an application for rehearing has not been made under s. 475 or s. 478 of the principal Act, or has been refused, the owner of the ship, or any other person who, having an interest in the investigation or inquiry, has appeared at the hearing, and is affected by the decision of the Court, may appeal from that decision in the same manner and subject to the same conditions in and subject to which a master may appeal under those sections against a decision with respect to the cancelling or suspension of his certificate":—

Held, that a master who had been censured in respect of a casualty to his ship by a Colonial Court of Inquiry, but had not had his certificate (British) cancelled or suspended, probably had a right of appeal under s. 478 of the Act of 1894, but certainly had the right under s. 66 of the Act of 1906 as being "a person having an interest" in the inquiry, who has appeared at the hearing, and is "affected by the decision of the Court."

Motion on behalf of the master of the British steamship *Royal Star* to determine as a preliminary point the question whether he had the right to appeal from the decision of a Court of Inquiry which had censured him in respect of a casualty to the ship, but had not cancelled or suspended his certificate.

On January 13, 1927, the *Royal Star*, while on a voyage from China to London, struck a submerged rock or reef near Batu Beranti in Singapore Strait. In accordance with the provisions of the Straits Settlement Merchant Shipping

Ordinance, 1910, an inquiry by a Court of formal investigation was held at Singapore. The Court was unable to decide whether the *Royal Star* struck a charted or an uncharted rock or reef, but severely censured the master for setting a course which took the vessel into the position where she struck. The Court, however, held that it was not a case for the cancellation or suspension of the master's certificate. The finding of the Court, in accordance with the usual procedure, was signed by the governor of the colony and transmitted to the Board of Trade. The master gave notice of appeal, which was duly served on the Board of Trade, and also applied for a rehearing. The Board refused the application for a rehearing, and raised the objection that no appeal lay unless the officer's certificate had been cancelled or suspended. Accordingly a summons was taken out in the Admiralty Division of the High Court for leave to proceed by motion in the Divisional Court to determine as a preliminary point the question whether the applicant had the right to appeal. The registrar granted leave.

Dunlop K.C. and *R. F. Hayward* for the applicant. The right to appeal is based on s. 478 of the Merchant Shipping Act, 1894, and on s. 66 of the Amending Act of 1906, which enlarges the rights of appeal from Courts of Inquiry. (1) Under sub-s. 6 of s. 478 of the principal Act an appeal lies from "any order or finding" of the Court, and in this case there is a "finding" that the master has been guilty of negligence. The Court of Inquiry sits in public, and its report containing the finding of censure is forwarded to the Board of Trade and is also indexed at Lloyd's. In the words of s. 66 of the Act of 1906, therefore, the master is certainly an interested person "affected by the decision of the Court."

Alfred T. Bucknill for the Board of Trade. Sect. 478 of the Act of 1894 and s. 66 of the Act of 1906 must be read in conjunction with s. 475 of the Act of 1894, which allows a rehearing or appeal only in cases where the Court of Inquiry

(1) The relevant sections of the Acts are sufficiently set out in the headnote and in the judgment of the President.

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has given a decision with respect to the cancelling or suspension of an officer's certificate. Sect. 475 has not been repealed by the Act of 1906. The Board of Trade had no option except to take the course which they had taken. They are not desirous of denying any master a right of appeal which is given to him by law, but merely wish to ascertain the view of the Admiralty Court, as it appears from a decision of Sir Francis Jeune P. and Barnes J. in *The China* (1)—a rehearing under ss. 475 and 478 of the Act of 1894 of an investigation into the circumstances attending the stranding of the ship on Perim Island—that a view contrary to that put forward by the present applicant was held. In that case the Court said that it " desires to express its opinion that the action taken by the Board of Trade in ordering a rehearing of this case has been both just and proper. Mr. Crawford's (the second officer) certificate was not dealt with by the Court at Aden, and he was therefore unable to appeal against the judgment of that Court, and unless the case had been reopened by the Board of Trade he would have been without any opportunity of having his conduct further inquired into and of clearing himself from the censure passed upon him."

The master is not " affected " within the meaning of s. 66, inasmuch as his certificate has not been dealt with. He is not, however, without a remedy, for the Board of Trade can be compelled by mandamus to grant a new trial if he can bring forward new and important evidence which could not have been produced at the inquiry : see s. 475 and *The Ida.* (2)

[Reference was also made to *The Golden Sea* (3) and, on the question of costs, *The Famenoth.* (4)]

No reply was called for.

THE PRESIDENT (LORD MERRIVALE). This is a preliminary application in a proposed appeal of an officer in the Merchant Marine service against a finding of the Wreck Inquiries Court in the Straits Settlements, by which he conceives himself to be aggrieved. The Court in the Straits Settlements found

(1) Unreported, Feb. 23, 1899.
(2) (1886) 11 P. D. 37.
(3) (1882) 7 P. D. 194.
(4) (1882) 7 P. D. 207, 216.

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him guilty of negligence in three particulars, whereby the *Royal Star*, a vessel of some 8000 tons, had been stranded; expressed its severe censure judicially; and declared that it did not deem it necessary to deal with his certificate. That, of course, is a grave matter for an officer in the mercantile marine service, especially an officer who has been in charge of one of the great ships which sail the wide seas; and he seeks to secure reconsideration of those findings of negligence, and of the censure which has been so expressed.

Whether he is entitled to an appeal is a matter of statute. He is not so entitled unless some statute, which creates the jurisdiction under which he has been placed at disadvantage, confers a right of appeal. The view has been taken that there is a limited right of appeal which does not apply to his case—that under the terms of the relevant sections in the Merchant Shipping Acts of 1894–1906, if his certificate had been dealt with he would have been entitled to appeal, but that, in view of the fact that his certificate has not been dealt with, the statutes give him no right of appeal. The matter has been well and concisely argued, and it was hardly necessary that Mr. Bucknill should emphasize the fact that the Board of Trade has no desire to restrict, in the case of officers in the mercantile marine service, the right of access to His Majesty's Courts when they are aggrieved. The Board of Trade would fail in its plain duty if it pursued any such course. It has not done so, and in desiring a determination of the preliminary question here the Board of Trade has simply taken account of opinions expressed from the Bench from time to time, and views which have evidently been held by judicial authorities of great eminence and competence. But the question still has to be determined.

It is said on behalf of the proposed appellant that under the relevant provisions of the Merchant Shipping Act, 1894, ss. 475 and 478 in particular, he probably had a right of appeal—that there is a construction of these sections which would give him a right of appeal—but it is said further that under s. 66 of the Merchant Shipping Act, 1906, he has unmistakably a right of appeal. The relevant sections of

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the Merchant Shipping Act of 1894 certainly do not make it clear beyond all doubt. I think they are capable of a construction which would give the right of appeal. After providing for wreck inquiries, and established tribunals which have power to deal with the certificates of masters, mates and engineers, and providing power for the Board of Trade to order the rehearing of any such inquiries, sub-s. 3 of s. 475 provides: "Where on any such investigation or inquiry, a decision has been given with respect to the cancelling or suspension of the certificate of a master" and so forth, an appeal shall lie. I pressed Mr. Bucknill, perhaps too closely, as to whether in this case there had been a decision with respect to the cancelling or suspension of the certificate of the proposed appellant, but Mr. Bucknill found an answer to the question, which was that it depended upon the true construction of the sub-section. In my opinion there was a decision with respect to the cancelling or the suspension of the certificate of the proposed appellant, inasmuch as it was decided to be unnecessary to cancel or suspend his certificate. That does not look like the kind of decision against which the right of appeal is of necessity to be assumed; it leaves the matter an open question. I do not express any concluded view against the proposition that there would be a right of appeal there—I leave that matter where it is. But s. 475 deals with wreck inquiries in this country, and s. 478 deals with wreck inquiries in the Dominions over seas and deals with them in a different manner, because, after giving to the Board of Trade the like power of ordering a rehearing which was expressed in s. 478, the section says: "An appeal shall lie from any order or finding of the Court or Tribunal holding the inquiry to the High Court in England." It was suggested that a possible view of the two sections was that those general words in s. 478 are limited by the specific words in s. 475, and we are asked to apply a well known rule of construction. In my view the general words in s. 478 are not limited by the express words in s. 475. I think an appeal lies at the instance of a party to the proceedings from an order or finding of the Court or tribunal holding

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the inquiry except in the specified cases where such an appeal, it is directed, shall not lie.

That is the view I hold upon the Merchant Shipping Act of 1894, but many things have happened since 1894. From time to time there has been resort to this Court by persons alleging themselves to be aggrieved, and it was found that persons might suffer a substantial grievance by proceedings before tribunals dealing with shipping casualties and be left without a specific right of redress. There was a case to which my Brother referred of the owners of a vessel who were in effect placed in a position of great disadvantage and were held not to be within the provisions of the Act which gave the right of appeal. By reason of occurrences of that kind s. 66 was placed in the Merchant Shipping Act of 1906. That section provides that where, in any investigation or inquiry such as is here under consideration, the Court finds that the shipping casualty has been caused or contributed to by the wrongful act or default of any person—the owner of the ship or any other person—who having an interest in the investigation or inquiry has appeared at the hearing, and is affected by the decision of the Court, such person may appeal. It is necessary after reading that section for us to see whether the proposed appellant comes within its terms. Had he an interest in the investigation or inquiry? He had. He was accused of negligence and was subject to the cancellation of his certificate, or to the indorsement of his certificate. Had he appeared at the hearing? He had. He had appeared, and given his evidence. Was he affected by the decision of the Court? That has been submitted as the true question here. He was found guilty of negligence—that is of professional misconduct. He was found guilty at a public proceeding, and the decision of the Court was placed on record. The Court sat in public, as such Courts do, and, of course, ought to do. To my mind it is impossible to say that an officer in the merchant service, who has been so tried upon charges of negligence, and found guilty, is not affected by the decision of the Court. It seems to me that he is placed very nearly in the position of a person tried under a

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criminal charge who is found guilty but who is subjected to no sentence. That being so it seems to me that the proposed appellant has a right of appeal, probably under the sections of the Act of 1894, but certainly under s. 66 of the Act of 1906.

In my view the proposed appellant is entitled to succeed upon this motion.

HILL J. I agree. Whether under s. 475 of the Act of 1894 an officer who was found guilty of negligence, but whose certificate was neither cancelled nor suspended, had a right of appeal, I express no opinion. Assume that he had no such right under s. 475, in my opinion the words of s. 478, which are so much wider than the words of s. 475, gave him a right of appeal from a Colonial Court of Inquiry. But any doubt is removed by s. 66 of the Act of 1906, which was passed—as is clear upon its terms—in order to enlarge the right of appeal. That section includes the master in this case, in that he appeared, and, indeed, must have been given notice to appear, because it was proposed that his certificate should be dealt with, and he was in my view quite clearly a person affected by the finding that the casualty had been caused by his negligence. I, therefore, agree that he has a right of appeal.

THE PRESIDENT. The question of costs will stand over until the hearing of the appeal.

Solicitors for the applicant: *G. F. Hudson, Matthews & Co.*

Solicitor for the Board of Trade: *The Board of Trade Solicitor.*

E. C. M. T.

THE JANERA.

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Dec. 12.

Shipping—Collision—Action and Cross-action in Egypt—Writ in personam in England—Discontinuance of Egyptian Cross-action—Motion to set aside English Writ—"Vexatious and oppressive" Proceedings.

In respect of a collision in the Red Sea the owners of the steamship *J.* issued a writ in the Egyptian Courts against the owners of the steamship *M.* and obtained bail. Shortly afterwards the owners of the *M.* instituted a cross-action against the owners of the *J.*, also in Egypt. On October 18 the owners of the *M.* issued a writ in personam in England against the owners of the *J.*, who entered appearance under protest and set down a motion to set aside the writ. On December 6 the owners of the *M.* discontinued their cross-action in Egypt:—

Held, that if the cross-action had still been pending the owners of the *M.* might have been put to their election, but as they had already elected there was no justification for staying the action in England merely because they were defendants to an action in another country in respect of the same subject-matter.

Motion by the defendants, the Anglo-Egyptian Oilfields, Ld., owners of the steamship *Janera*, to set aside a writ in personam and stay all proceedings in an action brought against them by Masconomo G.m.b.H., the owners of the German steamship *Masconomo*, on the ground that the proceedings were vexatious and oppressive.

It appeared that on July 8, 1927, a collision between the two vessels took place in the Red Sea. On August 6 the present defendants obtained an order in the Egyptian Courts for the arrest of the *Masconomo*, and on August 12 her owners gave bail. On August 16 the Anglo-Egyptian Oilfields, Ld., issued their writ in the Egyptian Courts against the owners of the *Masconomo*, and on August 20 the latter issued a cross writ in personam against the Anglo-Egyptian Oilfields, Ld., also in Egypt. On September 12 a maritime expert appointed by the Mixed Tribunal to survey the damage and "report upon the circumstances of the collision and to indicate the parties responsible therefor," reported in favour of the *Janera*. On October 18 the owners of the *Masconomo* issued the present writ in this country. On October 27 the action and cross-action came on for trial before the Mixed Tribunal at Port Said and were adjourned. On November 2 the

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present defendants entered an appearance to the English writ under protest, and on November 22 obtained an extension of three weeks in which to serve notice of motion to set the writ aside. The notice was served on December 7, and on the previous day, December 6, the owners of the *Masconomo* discontinued their cross-action in Egypt.

Langton K.C. and *H. G. Willmer* for the defendants in support of the motion. The action should be stayed on the ground that it is oppressive and vexatious to the defendants for there to be two actions concerned with the same set of facts proceeding in two separate countries at the same time. The plaintiffs elected to bring a cross-action in Egypt; they did not start their proceedings here until the expert appointed by the Court had decided against their vessel; and they took no steps to discontinue until they knew that the defendants were applying to set aside the present writ. There is no direct authority; the case differs from *The Christiansborg* (1) and *The Mannheim* (2), which turned upon the question of bail, or some equivalent guarantee, having been given in the foreign country by the parties whom it was sought to make defendants in this country. The present case turns solely on the question of vexatiousness. One finding of fact decides both the Egyptian and the English action and that distinguishes the case from *Peruvian Guano Co.* v. *Bockwoldt.* (3) Under s. 41 of the Judicature (Consolidation) Act, 1925, the Court has a discretion to stay proceedings in this country. As a matter of convenience Egypt is much more suitable for the trial, both vessels trade to Egyptian ports and do not come to England. Further, the defendants have got bail in Egypt and cannot abandon their action in that country, for if they counterclaimed here and obtained judgment they might get no satisfaction, as the plaintiffs are foreigners. Both actions, therefore, must proceed, and costs will be duplicated.

Dunlop K.C. and *Balloch* for the plaintiffs were not called on.

(1) (1885) 10 P. D. 141. (2) [1897] P. 13.
(3) (1883) 23 Ch. D. 225.

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HILL J. In my view this application fails. It is a motion to stay an action in personam brought by the owners of the German steamship *Masconomo* against the defendants, who have been properly served within the jurisdiction. The ground of the application is that it was vexatious of the plaintiffs to issue the writ and that therefore they ought not to be allowed to sue here. The collision in respect of which the proceedings arise happened somewhere near Egyptian waters and the present defendants, the Anglo-Egyptian Oilfields, Ld., began an action in the Egyptian Courts against the owners of the *Masconomo*. At some stage of those proceedings the present plaintiffs issued in the Egyptian Courts a cross writ against the present defendants, the owners of the *Janera*, but I have to deal with the matter as it exists to-day. While this motion was pending the present plaintiffs withdrew their cross-action, and therefore they are not now parties as plaintiffs to any proceedings in Egypt. They still remain parties to proceedings in Egypt as defendants in the action brought against them by the Anglo-Egyptian Oilfields, Ld.

It seems to me quite clear that the Court ought not to stay a plaintiff in the Courts of this country on the ground that he happens to be a defendant elsewhere. Therefore, as things are at present, I see no ground for staying these proceedings. It is said that I ought to stay the action here, because, up to a point, the plaintiffs took part in the proceedings in Egypt and themselves at one time were plaintiffs there. I do not think I ought to do more than consider the state of the proceedings in the one country and the other at the time I am asked to stay. As regards the plaintiffs' action in Egypt, it is to be presumed that the Mixed Tribunal in Egypt will be able to give the Anglo-Egyptian Oilfields, Ld., all the costs which have been thrown away by these proceedings of the German owners which have been abandoned, and the Anglo-Egyptian Oilfields, Ld., have bail which appears to be in excess of the damage which they have suffered. I cannot think that I ought to stay a proceeding properly brought in this country solely because the people who

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have brought that action are defendants in proceedings in Egypt. I have asked for authority on the subject and the defendants cannot find any, and in that position I can see no justification for staying the present action. In general, if the cross-action brought by the plaintiffs were still proceeding in Egypt I think the proper course would have been to put them to election, but as they have already elected and acted upon their election, and have abandoned the proceedings in Egypt, and as there are no proceedings by them anywhere else, I cannot interfere or deprive them of a right which otherwise undoubtedly they possess, to sue in this country. The motion must be dismissed with costs.

Solicitors for the plaintiffs: *Thomas Cooper & Co.*
Solicitors for the defendants: *Waltons & Co.*

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Nov. 11, 14, 15; *Dec.* 9, 15.

THE TOURAINE.

Shipping—Damage to Cargo—Bill of Lading incorporating Sea-Carriage of Goods Act, 1924, *of the Commonwealth of Australia* (*No.* 22 *of* 1924)—*Neglect in the "Management" of the Ship.*

The plaintiffs' bales of opossum skins were shipped on board the defendants' steamship under bills of lading incorporating the Sea-Carriage of Goods Act, 1924, of the Commonwealth of Australia, by which the carrier is not responsible for damage arising from "act, neglect or default of the . . . . servants of the carrier in the navigation or in the management of the ship"; but the Act also provides that the carrier is at liberty to surrender in whole or in part any of his rights and immunities thereunder, provided such surrender is embodied in the bill of lading. The bills of lading contained a clause providing that "the carriers are not to be responsible for faults or errors of navigation."

The skins were damaged by water which entered the compartment where they were stowed through a fractured waste-pipe leading from the seamen's wash-house. The fracture was caused after the voyage commenced by a seaman negligently using an iron rod to clear the pipe from obstruction in order to put the wash-house floor in a proper state:—

Held, (*a*) following *The Rodney* [1900] P. 112, that the act of clearing the pipe was "neglect in the management of the ship"; and (*b*) that by retaining the exception of "faults or errors of navigation" the defendants had not impliedly surrendered the immunity in respect of neglects in management, and that accordingly they were relieved from liability.

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DAMAGE TO CARGO.

The plaintiffs, the owners of nine bales of opossum skins laden on board the steamship *Touraine*, claimed against the owners of the *Touraine* (none of whom were domiciled in England) in respect of damage to the skins, which were delivered wet. The skins were shipped at Sydney, for delivery at Hamburg, under bills of lading issued subject to all the terms and provisions of, and to all the exemptions from liability contained in, the Sea-Carriage of Goods Act, 1924, of the Commonwealth of Australia. By art. III. (1.) of the Schedule to that Act "the carrier shall be bound before and at the beginning of the voyage, to exercise due diligence to (*a*) make the ship seaworthy; (*b*) properly . . . . equip . . . . the ship; and (*c*) make the holds . . . . and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation." By art. III. (2.): "Subject to the provisions of art. IV., the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

The plaintiffs alleged that the damage to the skins was not caused by any of the perils excepted by the bills of lading and did not arise or result from any of the causes mentioned in art. IV. Their case was that a drain-pipe from the sailors' wash-room, which passed through the compartment in which the bales had been stowed, was fractured, and salt water had thereby found its way to the bales and damaged them. The plaintiffs alleged that the *Touraine* before and at the beginning of the voyage was unseaworthy and not fit and safe for the carriage of the skins.

Various defences were raised. Those material to this report were that by art. IV. (2.) of the Sea-Carriage of Goods Act neither the carrier nor the ship are responsible for damage arising from "act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship," and that if (which was not admitted) the drain-pipe was fractured, such fracture was caused during the voyage by a member of the crew negligently poking the pipe with an iron rod in order to clear away obstruction

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which blocked the pipe after the *Touraine* had left Sydney. Further, the bills of lading provided that " the carrier will not be accountable to any extent or under any circumstances whatever for furs . . . ." nor (in accordance with art. IV. (5.) of the Schedule to the Act), " exceeding 100*l.* per package or unit . . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading." The value of the bales of skins was not declared at the time of shipment nor were the bills of lading signed with a declaration of the nature or value of the bales.

Dunlop K.C. and *Darby* for the plaintiffs. The only exception the defendants can rely on is that contained in art. IV., r. 2 (*a*), of the Schedule to the Sea-Carriage of Goods Act—namely, that they are not responsible for damage resulting from the neglect of their servants in the navigation or in the management of the ship. But it is submitted that they cannot rely on this exception for the following reason. By art. V. the carrier is at liberty to surrender in whole or in part all or any of his rights and immunities under the Rules, provided such surrender is embodied in the bill of lading. In the bills of lading the defendants have embodied a clause which provides that " the carriers are not to be responsible for faults or errors of navigation." By implication, therefore, the defendants must be taken to have surrendered their immunity in respect of "neglects . . . . in the management of the ship." But, even if it be held that the defendants are still entitled to rely on this exception, it does not apply in the circumstances of this case, because the act of clearing the pipe in order that the seaman could more comfortably take a bath was not an act of neglect in the management of the ship within the meaning of the statute. The wash-house was always wet and the water did no harm; the seaman cleared the pipe for his own private purpose. *The Rodney* (1), which may be relied on by the defendants, is distinguishable. In that case the crew's quarters were flooded and, of course, the pipe had to be freed. Further,

(1) [1900] P. 112.

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the defendants have not proved conclusively that the damage to the pipe was occasioned after the ship left Sydney. If it took place before she sailed, the defendants are liable for not exercising due diligence to make her seaworthy before and at the beginning of the voyage. The onus of proving due diligence, and of establishing their immunity, is on the carriers: see art. IV. and *Gosse Millard* v. *Canadian Government Merchant Marine* (1) and *Angliss & Co. (Australia) Proprietary, Ld.* v. *P. & O. Steam Navigation Co.* (2) The proper inference to draw, however, is that the ship was unseaworthy in any event, inasmuch as the strong room through which the pipe led was not a fit and proper place for the skins to be stowed. The pipe had choked on previous occasions, and the defendants knew, or ought to have known before the voyage began, that there was a risk of it happening again, and that the pipe was a source of danger. Further, it was intended to have a rose to protect the pipe from the danger of getting obstructed, and the rose had been broken and not replaced. What in fact happened might reasonably have been expected and should have been guarded against: see *The Schwan* (3) and *Standard Oil Co. of New York* v. *Clan Line Steamers, Ld.* (4) If water did get into the strong room, it could not get out, for there were no scuppers; it was the more incumbent upon the defendants therefore to take every precaution.

Assuming the plaintiffs to be right upon the main question, there remain the provisions as to limitation of liability. Clause G in the bills of lading, which provides that the carriers will not be liable under any circumstances whatever for furs, is clearly inconsistent with the Rules of the Sea-Carriage of Goods Act; and if the defendants rely on r. 5 of art. IV. of that Act, which limits liability to 100*l.* "per package or unit," unless the value of the goods has been declared before shipment and inserted in the bill of lading, the unit is not a bale, but a parcel. It is a mere accident that the eighty-one parcels were made into nine bales.

(1) [1927] 2 K. B. 432; reversed (on another point) [1927] W. N. 314.
(2) [1927] 2 K. B. 456.
(3) [1909] A. C. 450.
(4) [1924] A. C. 100.

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Langton K.C. and *J. St. C. Lindsay* for the defendants. The defendants have to establish the cause of negligence and they have done so, and *Gosse Millard* v. *Canadian Government Merchant Marine* (1) is not an authority that the onus on the carriers is any higher than that. As regards the point that the defendants have by implication surrendered their right to rely on "neglects in the management of the ship," the answer is that they are not liable for such neglects unless the fact that they have agreed to surrender their immunity is embodied in the bills of lading. The defendants have established that the act of negligence took place after the ship sailed, and *The Rodney* (2) is authority for the proposition that clearing the pipe of the obstruction constituted an act or neglect in the management of the ship. The ship was not unseaworthy or unfit for the stowage of the skins. It was not reasonably to be anticipated that a seaman would use an iron rod, the usual thing used to clear the pipe was a piece of wire.

As regards the provision in the bills of lading that the carriers will not be accountable for furs, it is submitted that the shipowners can make a special agreement in respect of goods which they do not usually carry and can then make the bill of lading contract on the basis of that agreement; but it is admitted that *Hordern & Sons* v. *Commonwealth and Dominion Line* (3), decided under the Harter Act, is pro tanto against this contention. The unit of liability, however, must be the bale. The liability, when the value of the goods has not been declared, is 100*l.* "per package." If the plaintiffs' contention that package means parcel is right, each skin might be separately wrapped and held to constitute a "package." The skins were shipped as bales under separate bills of lading, and the word "bale" is not an ambiguous term.

[*Pendle and Rivett, Ld.* v. *Ellerman Lines, Ld.* (4), was referred to.]

Cur. adv. vult.

(1) [1927] 2 K. B. 432; (C. A.) [1927] W. N. 314.
(2) [1900] P. 112.
(3) [1917] 2 K. B. 420.
(4) Now reported (1928) 72 Sol. J. 15.

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1927. Dec. 15. HILL J. read the following judgment. This is a claim under five bills of lading of opossum skins shipped in Sydney in October, 1926, for delivery at Hamburg, and delivered damaged. The damage was by water, whether fresh or salt is immaterial. It was water which entered the strong room in which the skins were stowed, from without. The defendants say that the damage was caused by negligence for which they are not responsible. That is the first question to be decided. The plaintiffs, while denying such cause, say that the cause was the unseaworthiness or unfitness of the ship. That is the second question.

If the defendants fail on these points they say that (*a*) they are not liable at all for furs—a question which depends on the bills of lading read in the light of the Act; or (*b*), they are liable only to the limited extent per bale fixed by the Act. The Act applicable is the Sea-Carriage of Goods Act, 1924, of the Australian Commonwealth.

I have come to a clear conclusion as to how the damage was caused. The skins were the only cargo stowed in the strong room. The strong room was aft and between the main and shelter decks. Above it, at its fore end on the starboard side, was the sailors' wash-house. This wash-house was on the shelter deck. It had a cement floor. Waste water was carried from the floor of the wash-house to the ship's side by a leaden pipe which passed through the strong room. There was a hole in the cement communicating through a hole in the shelter deck with the upper end of the pipe, which was fitted by a flange to the under side of the shelter deck. At the lower end the pipe was fitted by a flange to a hole in the ship's side, which was fitted with a storm valve. There were two bends in the pipe. The upper one was a sharp bend a little below the upper end of the pipe. The pipe, and also a pipe from the w.c.'s adjoining the wash-house, were cased in with a wooden casing, the object of which was to protect the pipes from injury. In the floor of the strong room were scuppers leading to the bilges. The only access to the strong room was by a trunk hatchway opening on the poop deck.

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Before the skins were loaded there was no sign of moisture in the strong room. During the voyage, before the ship reached Aden, some scraping work was done in the trunk-way, and the skins were shifted to the fore part of the strong room and thereby brought nearer to the pipe. At this time nothing wrong was noticed and there was no water in the strong room. At Hamburg the skins were found wet and very seriously damaged. There was water on the floor of the strong room, sufficient to have shifted the dunnage wood. The scuppers were choked and the water had to be baled out. The water had entered the strong room by a hole or crack in the lead waste-pipe at the bend a little below the shelter deck. The water had come from the wash-house.

It is in my judgment impossible to suppose that this hole or crack existed before the voyage began. It must have come into existence during the voyage. The wash-house was in regular use. It contained a shower-bath. It also contained basins which seem not to have been used. But the sailors brought into the house pails of fresh water and there washed themselves and sometimes their clothes. The pails were emptied on to the floor. The wood casing in the strong room was not watertight. Had the hole or crack in the pipe been in existence during the earlier part of the voyage, water must have got into the strong room, and some signs of water must have been obvious when the chief officer was in that room in connection with the scraping work and the bales were shifted. It was suggested that the hole or crack might have been there all the time but plugged by refuse. I cannot believe that any refuse which could get down the pipe could have so effectually stopped an existing crack as to prevent the percolation of any water.

How was this hole or crack, which came into existence during the voyage, made? I find it proved that it was made by the seaman Olsen. He found the pipe choked, so that there was water on the floor of the wash-house, and he used an iron rod to clear the obstruction, and used it with

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such force as to pierce or crack the lead of the pipe in the neighbourhood of the bend.

It is true that in the log the leak was stated to be due to a burst in the pipe caused by straining of the ship. But at that time the pipe had not been seen by the master or chief officer. The carpenter reported a crack and made the pipe watertight with a stocking of marline and red lead. It was not until after the next round voyage that the pipe was taken out and examined by surveyors and the real nature of the damage to it ascertained. The sailors were then questioned and the facts ascertained. Naturally, until questioned, they had not volunteered information which might reflect upon Olsen, and indeed may not have supposed that what they had seen Olsen doing had damaged the pipe.

In my judgment, upon these facts, it has been proved by the defendants that the cause of the damage was the negligence of the seaman in making the hole or crack in the pipe; and in my judgment such negligence was "neglect in the management of the ship." It was neglect, for it was negligent to use an iron rod, and to use it with such force as to pierce or crack the pipe. The wash-house, and the waste-pipe therefrom, were essential parts of the crew's accommodation, and therefore of the ship. The act of clearing the pipe of an obstruction was a management of that part of the crew's accommodation, and therefore of the ship. If I need authority I have it in *The Rodney*. (1) It was contended that Olsen was not doing an act of management, because he was clearing the obstruction only for his own benefit. I do not agree. It was done in order to put the wash-house floor in a proper state.

Mr. Dunlop, for the plaintiffs, contended that the defendants were not entitled to rely upon an exception of negligence in management. The argument was this. The bill of lading contains a very large number of exceptions, including this: "The carriers are not to be responsible for faults or errors of navigation." In accordance with s. 6 of the Act it also contains an express statement that it is to have effect subject

(1) [1900] P. 112.

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to the provisions of the Rules as applied by the Act. (1) The clause is in the following terms: "CLAUSE PARAMOUNT. This bill of lading is to be read and construed as if every clause therein contained which is rendered illegal or null and void by the Sea-Carriage of Goods Act, 1924, had never been inserted therein or had been cancelled and eliminated therefrom prior to execution thereof, and is issued subject to all the terms and provisions of and to all the exemptions from liability in such Act." By the Rules, under art. IV. (2.), the carrier is not responsible for damage arising or resulting from "(*a*) act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship." But by art. V. a carrier is at liberty to surrender any of his immunities under the Rules, provided such surrender is embodied in the bill of lading. Now, says Mr. Dunlop, by retaining the exception of faults of navigation the carrier has impliedly surrendered the immunity in respect of faults of management. I do not accept that argument. The immunity is created by the statute and the surrender must be embodied in the bill of lading. In my opinion the surrender of a statutory immunity must be clearly stated. It is not to be inferred from the needless repetition of another immunity.

There remains the question whether the ship was unseaworthy, or the strong room unfit or unsafe for the carriage of the skins, and whether the damage arose or resulted from such unseaworthiness or unfitness. The allegation in the statement of claim was that the pipe was fractured. As the case developed at the hearing other charges were made and were embodied in amended particulars. The attack was still, in the main, upon the pipe, and I will deal with that first. There was nothing unusual in the construction of the pipe or in the fact that it was carried through the strong room. A lead pipe is more usual for sanitary purposes, and is indeed more

(1) By s. 6: "Every bill of lading or similar document of title issued in the Commonwealth which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the Rules as applied by this Act."

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costly, than iron. The material of the pipe was good. The size of the pipe was sufficient. It had been fitted with a rose sunk in the cement, but the rose was broken. Mr. Camps said that it was a matter of opinion whether a rose was advisable—many ships had no rose to such a pipe; no one gave evidence to the contrary. It is obvious that, rose or no rose, some refuse from the wash-house —soap and bits of rag and so forth—might get down the pipe, and that more refuse might get down if there was no rose. It was also possible that such refuse should accumulate in the bend and cause an obstruction to the flow of the water from the wash-house. It is the sort of thing we are all familiar with. It happened on board the *Touraine* and had happened before the voyage in question. But the choking of the pipe by itself would not cause water to flow into the strong room. The water would accumulate on the floor of the wash-house until it rose above the sill, and then would flow on to the deck and away to the ship's side. When the pipe choked, the seamen would be likely to do their best to clear the obstruction. They had on previous occasions cleared the obstruction by using a wire. If such an instrument were used the pipe could not be pierced or cracked. If a stiffer instrument, such as an iron rod, were used, and used with sufficient force, the pipe might be pierced at the bend, as happened when Olsen used the iron rod. But I cannot think that any one concerned with the ship ought to have anticipated that so foolish a means to clear the pipe would be used, or that the sailors ought to have been warned not to act in such a way. The question I have to ask myself is, I think, that indicated by Lord Gorell in *The Schwan* (1), and it is this: "Was the vessel in respect of this pipe reasonably fit to be worked in the way which might ordinarily be expected?" I think it was. If so, then, in respect of the pipe the ship was not unseaworthy nor the strong room unfit or unsafe.

There is, in my judgment, no substance in the other matters alleged by the plaintiffs. Had they been set forth in the

(1) [1909] A. C. 450, 463.

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statement of claim the defendants might have obtained further evidence. But upon the evidence as it stands, I do not think the plaintiffs have made good any case of unseaworthiness or unfitness. I will take them in the order of the allegations :—

(*b*) No means of ascertaining whether any water did get into the strong room. It is not usual to have *sounding pipes* in such a compartment which lies high above the load line. There is no necessity for them, for water is not expected to find its way into such a space.

(*c*) The *scuppers* were choked or likely to get choked. It is true that they were found to be choked when examined subsequent to the voyage. But I see no reason at all to suppose that they were choked before the voyage in question began. The strong room had been examined before the skins were shipped. A choking of the scuppers would be a natural consequence of the water from the wash-house carrying some refuse with it and collecting more from the floor of the strong room and from the wrappings of the bales. But over and above this I doubt if a strong room such as this would be unfit for bales of skins, even if it had no scuppers. There was no reasonable probability that water should enter the strong room. Scuppers in such a place are provided mainly to carry off water when the compartment is washed out. They also serve to carry off moisture from a cargo liable to sweat. The scuppers were amply sufficient to carry off any such condensed moisture.

(*d*) *Ventilation*. There was in fact sufficient ventilation ; and indeed, with the quantity of water in the strong room, it made very little difference whether there was ventilation or not.

(*g*) The point about a *storm valve* was not insisted on. There was a storm valve, and the water came from the wash-house and not from the sea.

The other points (*a*), (*e*) and (*f*) I have already sufficiently dealt with.

The result is that in my judgment the ship was not unseaworthy nor the strong room unfit or unsafe. The question of due diligence, therefore, does not arise.

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In view of these findings it is unnecessary to decide the remaining answers of the defendants or the reply thereto of the plaintiffs. As at present advised I should have had great difficulty in reconciling with the Rules either a total exemption in respect of furs, or the plaintiffs' argument that art. IV., r. 5, did not fix a limit per bale of 100*l*. There will be judgment for the defendants with costs.

Solicitors for the plaintiffs: *Waltons & Co.*
Solicitors for the defendants: *Wm. A. Crump & Son.*

E. C. M. T.

[IN THE ARCHES COURT OF CANTERBURY.]

1927
Dec. 13.

ON APPEAL FROM THE CONSISTORY COURT OF ST. EDMUNDSBURY AND IPSWICH.

THE RECTOR AND CHURCHWARDENS OF CAPEL ST. MARY, SUFFOLK *v.* FRANK VICTOR PACKARD.

Ecclesiastical Law—Cause of Faculty—Remission to Consistory Court by Court of Arches to decree Faculty—Insertion in Faculty of Condition alleged to be improper—Right of Appeal—What Conditions may properly be inserted in Faculties—Object and Effect of decreeing Faculty "till further order"—Distinction between the Order of Court in a Faculty Suit and the Faculty—Matters exclusively proper to each.

Held, by the Court of Arches, that where a cause of faculty has been remitted by that Court to a Consistory Court to decree a faculty as directed by the Court of Arches, a party to the suit who is aggrieved by a condition proposed to be inserted in the faculty may appeal to the Court of Arches by way of the assertion of a grievance, and that the Court of Arches may hear and determine the appeal without retaining the cause.

Quaere, if in such circumstances the Court of Arches has power to retain the cause.

Held, further, that a condition in a confirmatory faculty "that if any of the articles included in the faculty are treated with superstitious reverence we reserve to ourselves the right to order their removal at any time hereafter upon being satisfied hereon" is an improper condition, and that such a condition is not substantially similar to but wholly different from a condition that the faculty is granted "till further order."

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Observations by the Dean of the Arches upon the object and effect of granting a faculty till further order, the proceedings required by the practice of the Courts before such further order can be made, the distinction between the order of the Court in a faculty suit and the faculty, and the matters which are proper to be included in each.

THIS was an appeal by the Rector and Churchwardens of Capel St. Mary, Suffolk, from a decision given in Chambers by the Chancellor of the diocese of St. Edmundsbury and Ipswich (F. K. North, Esq.) with respect to the form of a confirmatory faculty about to be issued out of that Court in a cause of faculty. In that cause, which is reported in the Law Reports in the Court of Arches (1), the petitioner sought the removal of various articles from the parish church of Capel St. Mary in circumstances fully set out in the former report. The Rector and Churchwardens appeared in opposition and prayed a confirmatory faculty for the articles in question. The Chancellor by his judgment decreed a faculty for the removal of some of the articles and a confirmatory faculty in respect of others. No condition was by his judgment attached to the grant of the confirmatory faculty. The respondents appealed from this decision with regard to the articles ordered to be removed, but there was no appeal as to the confirmatory faculty. The Dean of the Arches held that certain articles ordered to be removed might be allowed to remain and directed them to be included in the confirmatory faculty "until further order," and, in one instance, subject to an undertaking by the Rector, which was duly given. He remitted the cause to the Consistory Court. During negotiations between the parties' solicitors for the purpose of agreeing the form of the confirmatory faculty, the petitioner's solicitors proposed that the following condition be inserted therein: "That if any of the said articles are treated with superstitious reverence we reserve to ourselves the right to order their removal at any time hereafter upon being satisfied hereon." The respondents' solicitors refused to agree to this condition, and, upon its insertion being approved by the Chancellor, the respondents appealed.

(1) [1927] P. 289.

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1927. Dec. 13. The appeal came on to be heard before the Dean of the Arches (SIR LEWIS DIBDIN, D.C.L.).

Sir Henry Slesser K.C. (with him *Edinger*) for the appellants. The appellants, conceiving that an improper and unjustifiable condition has been inserted in the draft faculty proposed to be granted by the Chancellor of the diocese, are obliged to come to this Court or they would have no remedy at all. We ask the Court to resume seisin of the case for the purpose of decreeing a faculty in accordance with the decision of this Court.

[THE DEAN OF THE ARCHES. I never knew or heard of an appeal of this kind, but I have no doubt that this Court must entertain it. But I do not think that the machinery whereby the Court entertains the appeal is that of retaining the original cause. In that cause this Court ordered certain faculties to be granted, and remitted the cause to the Consistory Court to carry out the order. In such circumstances it may be seriously doubted if the Court has power to retain the cause again. But you complain of what has since been done in the Consistory Court: you assert a grievance in regard to that in this Court, and I think you are entitled to do so without the necessity of asking for the original cause to be retained.]

If the Court is satisfied of its jurisdiction to hear this appeal the appellants are not concerned to dispute as to the means whereby the case comes before the Court.

The proposed defeasance clause is objectionable on various grounds. First, it is offensive, in that it not obscurely suggests that the law will be broken on the first opportunity. There is no justification for such a view in the present case. The Rector and Churchwardens have anticipated the faculty for removal by actually removing everything the removal of which will in due course be authorized by the faculty, and the Rector has already given in writing the undertaking required by this Court.

[THE DEAN OF THE ARCHES. I certainly think a condition such as that proposed may not unreasonably be regarded

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as offensive, but in this case, even if it were proper in itself, it is open to the objection that it is proposed to insert it in the faculty. In a faculty suit the order of the Court and the faculty are two wholly distinct things. A faculty is permissive: it is a licence or dispensation; and no faculty can properly include an order to or direction upon any person to do or abstain from any act. If the proposed condition were in any circumstances proper, it could only be proper in the order, not in the faculty. It is equally wrong for a faculty to contain directions as to costs, as I see the draft faculties in this case do.]

Secondly, as it is in no way specified how the Chancellor is to be "satisfied," it seems that he might be "satisfied" in some ex parte proceeding or indeed in a proceeding initiated ex mero motu and without notice to any one.

[THE DEAN OF THE ARCHES. As I understand it, the condition does involve this possibility.]

Thirdly, the confirmatory faculty ordered to be granted by the Consistory Court, which was not appealed against, was granted sine conditione, and in respect of the further articles directed to be included therein by this Court no such condition as is now in question was imposed, and the Chancellor had no jurisdiction to impose it in settling the form of the faculty.

[He was stopped.]

Wilfrid Lewis for the respondents. Without making the slightest reflection upon the present appellants, it is right that when a faculty is granted for articles capable of being abused power should be reserved to remove them if they are abused. No one knows what attitude a new rector may adopt.

[THE DEAN OF THE ARCHES. Nothing can now be inserted in this faculty unless it was ordered to be so inserted by this Court.]

All the articles which this Court authorized to be retained under the confirmatory faculty were only so authorized "until further order." In inserting the condition which is objected to the Chancellor was only carrying out and making explicit what this Court had intended.

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[THE DEAN OF THE ARCHES. Certainly not. The sole object of granting a faculty until further order is that if at any time hereafter proceedings shall be taken for the removal of the articles authorized by the faculty upon any ground, the Court in adjudicating in those proceedings shall not be hampered by technical considerations of whether the former faculty is binding upon it. Centuries of practice have made clear what the nature of such proceedings must be, and an instance will be found in *Liddell* v. *Beal.* (1) They are begun by petition. Citation or monition to show cause why the articles should not be removed then issues to the persons concerned—usually the incumbent and churchwardens. If cause be shown, then the matter is heard in the ordinary way by the Court and such order as justice requires is made. It never was or could be the object of granting a faculty until further order to prevent any of these steps being taken, nor can such a limitation in the faculty be rightly regarded as capable of reflecting upon any one. But such a condition as is here proposed cannot be other than irritating—not to say offensive—to the clergyman who has to act on the faculty, nor can its object be other than to enable the settled practice of the Ecclesiastical Courts to be in some respects departed from.]

The condition prescribes that the Chancellor shall be "satisfied." In such a document as this, "satisfied" must mean judicially satisfied—satisfied after a proper hearing.

[THE DEAN OF THE ARCHES. Then how does it help? All it could involve on this construction is already required by the practice of the Courts.]

A faculty is merely a dispensation and may be restricted. There is no authority for saying that this particular restriction cannot be imposed.

[THE DEAN OF THE ARCHES. You cannot expect to find express authority forbidding what no one has hitherto attempted to do. It is unnecessary, however, for me to decide whether such a condition is beyond the jurisdiction. It is

(1) (1850) 14 Moo. P. C. 1, 7.

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sufficient that it is contrary to the settled practice of the Ecclesiastical Courts and open to many practical objections. Moreover there is a further difficulty in your way which is insurmountable—namely, that this Court never authorized the imposition of this condition.]

No reply was called for.

THE DEAN OF THE ARCHES. I treat this as in substance a motion on minutes, and I shall not deliver a formal judgment. I have made my view plain during the argument. This condition cannot be supported. [The Dean of the Arches then went through the draft faculties in detail, indicating what amendments were required in them and, in so doing, he made the observations which follow :] When in a faculty suit what is called the *Davey* v. *Hinde* (1) order is made, that is to say an order that a faculty shall issue to the respondents to remove certain articles, with a further order that if they do not do so in a certain time a faculty for the purpose shall issue to the petitioner, these alternatives are proper subject-matter for the order, and the order only. Upon such an order, a faculty in the ordinary form and free upon its face of limitations or alternatives, should issue, or be tendered to, the respondents. If they refuse it, or refuse to act on it in due time, then a faculty equally free of limitations or alternatives upon its face should issue to the petitioner. It is wholly wrong to grant one faculty and attempt to embody these alternatives in it. To do so involves a complete confusion between the order and the faculty. Moreover it almost inevitably involves the attempt to give an order or direction by means of the faculty, which cannot be done. For this reason also, no faculty should contain an order as to costs. But as I find upon inquiry that in this case no order was ever drawn up in the Consistory Court, it seems necessary to permit the order as to costs in the Consistory Court to remain in the faculty where it now appears. But it is wrong. As to the order for costs in this Court, an order has been drawn up in the usual way in accordance

(1) [1901] P. 95, 126; [1903] P. 221, 237, 238.

with the judgment pronounced in this case, and, that being so, all reference to the costs in this Court must be struck out of the draft faculty.

Appeal allowed.

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Solicitors for appellants: *Brooks, Jenkins & Co.*

Solicitors for respondent: *Sharp & Benest, for Steward, Rouse, Vulliamy & Son, Ipswich.*

A. L.

Followed. In re HALL, DECD. [1950] P. 156

[IN THE COURT OF APPEAL.]

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July 14.

In re WHITE. (1)

Administration—Grant—Deceased wholly intestate and insolvent—Life Interest—Minority—Application by Widow for Grant to her alone—No Grant to less than two Individuals—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *ss.* 160, *sub-s.* 1; 162, *sub-s.* 1.

Upon the application of the widow of a man who had died wholly intestate and insolvent leaving infant children, for a grant to her as sole administratrix:—

Held, that the application must be refused inasmuch as:—

(1.) Under the prohibition contained in s. 160, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, against the grant of administration, in cases where a minority or a life interest arises, to not less than two individuals, the Court had no power to make the grant, and

(2.) the widow, being a person interested in the residuary estate of the deceased was not "some other person" to whom "by reason of the insolvency of the estate or other special circumstances" the Court is empowered by proviso (*a*) of sub-s. 1 of s. 162 of the Act to grant administration.

Semble. Proviso (*a*) of sub-s. 1 of s. 162 does not override or repel the express prohibition contained in s. 160, sub-s. 1, so as to enable the Court, in the case of insolvency or in special circumstances, to grant administration to a single person in those cases in which s. 160, sub-s. 1, requires the grant to be made to not less than two individuals.

In re Herbert [1926] P. 109 commented upon.

APPEAL from Hill J.

This was an application by Doris White the widow of James White, who died on June 29, 1927, insolvent and intestate, for a grant of administration to his estate. There were two infant children of the applicant and her late

(1) Publication of this case has been delayed by the lamented death of the Reporter.

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husband, aged respectively five and three years. The deceased had two daughters by his first marriage both of whom had attained twenty-one.

In her affidavit in support of the application, the widow stated that there were very many pressing matters which needed immediate attention, such as the sale as soon as possible of eight race horses which the deceased had in training and which were costing 5*l.* per week each and which, it was imperative, should be sold in order that purchasers might have the opportunity of entering them for forthcoming races whereby the purchase price would be enhanced. Until a legal personal representative had been duly appointed, no title to the race horses satisfactory to prospective purchasers could be made. Practically all the substantial assets of the deceased were mortgaged and his unsecured liabilities would run into hundreds of thousands of pounds, and there was no prospect of the unsecured creditors receiving anything. The widow also stated that she was supported in her application by the Westminster Bank, Ld., who were the principal creditors of the estate of the deceased.

On June 30, 1927, in an action in the Chancery Division, In the matter of the deceased's estate, in which the Westminster Bank were plaintiffs and the widow defendant, Eve J. made an order appointing a receiver, until a legal personal representative of the estate should have been constituted, to receive the rents and profits of the real estate and collect and get in the outstanding personal estate. In that action the Master had made an order for the sale of the race horses, but they were in the possession of the trainer, who claimed a lien on them for the expenses due in respect of their keep and training.

Hill J. refused the application on the ground that he had no power to make the grant to the widow alone under ss. 160 and 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, and gave leave to appeal.

Cotes-Preedy K.C. and *Durley Grazebrook* for the appellant. The question turns upon the construction of ss. 160 and 162

of the Supreme Court of Judicature (Consolidation) Act, 1925. (1) Sect. 73 of the Court of Probate Act, 1857, was repealed by the Administration of Estates Act, 1925, substituting other provisions which, in their turn, have been repealed by the later Supreme Court of Judicature (Consolidation) Act, 1925, which deals with the grant of probate or administration, and the sections relevant to this application are ss. 160 and 162.

Sects. 160 and 162 must be read together, and the former is subject to the modification introduced by the later section: *In re Herbert.* (2) Sect. 162 has really embodied s. 73 of the Court of Probate Act, 1857, and has given the Court some discretion where s. 160 was not sufficient. Sect. 160 provides that in the case of a minority or life interest arising under an intestacy, administration shall not be granted to

(1) The Supreme Court of Judicature (Consolidation) Act, 1925, provides as follows:—

Sect. 160.—(1.) Probate or administration shall not be granted to more than four persons in respect of the same property, and administration shall, if there is a minority or if a life interest arises under the will or intestacy, be granted either to a trust corporation, with or without an individual, or to not less than two individuals:

Provided that the court in granting administration may act on such prima facie evidence, furnished by the applicant or any other person, as to whether or not there is a minority or life interest, as may be prescribed by probate rules and orders.

(2.) . . . .

(3.) This section shall apply to grants made after the date of the commencement of this Act, whether the testator or intestate died before or after that date.

Sect. 162.—(1.) In granting administration the High Court shall have regard to the rights of all persons interested in the estate of the deceased person or the proceeds of sale thereof, and, in particular, administration with the will annexed may be granted to a devisee or legatee, and in regard to land settled previously to the death of the deceased and not by his will, may be granted to the trustees of the settlement, and any such administration may be limited in any way the court thinks fit:

Provided that where the deceased died wholly intestate as to his estate, administration shall—

(*a*) unless by reason of the insolvency of the estate or other special circumstances the court thinks it expedient to grant administration to some other person, be granted to some one or more of the persons interested in the residuary estate of the deceased, if they make an application for the purpose; and

(*b*) as regards settled land. . . . .

(2.) This section shall apply only in the case of persons dying after the date of the commencement of this Act. . . . .

(2) [1926] P. 109

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less than two individuals, but s. 162, sub-s. 1 (*a*), provides that in the case of total intestacy, unless " by reason of the insolvency of the estate or other special circumstances " the Court thinks it expedient to grant administration to some other person " administration shall be granted to some one or more of the persons interested in the residuary estate of the deceased, if they make an application for the purpose." Here the widow, " one " of the persons interested in the residuary estate, is making " an application for the purpose " of obtaining a grant, and not only is the estate insolvent, but we submit that there are also " special circumstances " and that the effect of the proviso to s. 162 is to modify the provisions in s. 160 negativing a grant in the case of a minority to not less than two individuals. No one else is willing to join in the application.

[LORD HANWORTH M.R. Sect. 160 deals with certain matters, and s. 161 deals with a trust corporation; but the proviso in s. 162 cannot make ineffective what has been enacted in the previous sections.]

We submit that the proviso modifies what has gone before, and deals with the case of an insolvency to which the ordinary rule should not be applied if the judge in his discretion thinks that it is a case where he can grant administration to one person.

[SARGANT L.J. But the proviso says that the grant may be made " to some other person," that is " other " than one or more of the persons interested in the residuary estate. The widow is so interested and therefore cannot be " some other person."]

But the widow is making " an application for the purpose," and I submit that it does not matter in what character she is regarded. We submit that in the special circumstances she is entitled to apply and get the grant. Even during a minority, the Court granted administration to a single creditor: *In re Herbert.* (1)

Arthur Sims for the receiver. I support the application on behalf of the receiver. So long as there is no duly

(1) [1926] P. 109.

constituted personal representative there can be no decree for administration in the Chancery proceedings.

Talbot-Ponsonby for the Westminster Bank also supported the application.

LORD HANWORTH M.R. This appeal must be dismissed. It is an appeal from an order of Hill J. upon an application which was important in view of the facts which led to the application being made. It appears that the late Mr. James White died under circumstances which left a considerable estate to be administered and preserved, and also that the estate was completely insolvent. He left a widow and some children who are minors, and the application is for the appointment of the widow to receive the grant of administration of the estate.

The section that is invoked is now s. 162 of the Supreme Court of Judicature (Consolidation) Act of 1925, and it is said that in view of the importance of administration being granted, and the difficulty which the widow has in getting any other person to be associated with her in accepting the grant, administration ought to be granted to the widow alone. Sect. 160, sub-s. 1, of that same Act provides that probate or administration shall, if there is a minority, or if a life interest arises under the will or intestacy, be granted either to a trust corporation with or without an individual, or to not less than two individuals. The words of that sub-section are plain, that where there is a minority or life interest the administration cannot be made to a less number of individuals than two. The sub-section also contains a proviso enabling the Court to grant administration upon prima facie evidence, so that it need not definitely and finally inquire whether or not there is a minority or a life interest, but it is a section providing for an application to be made. It is clear in its terms that the grant cannot be made to less than two individuals where there is a minority or a life interest.

Sect. 161 deals with the power of the Court to grant administration to a trust corporation, and then s. 162, sub-s. 1, gives a discretion to the Court as to the persons

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to whom administration is to be granted. Mr. Cotes-Preedy relies, and rightly relies, on the proviso to that sub-section, and if one takes the words and writes them out affirmatively rather than in their somewhat negative form, it is this : that there is a proviso that administration shall be granted to some one or more of the persons interested in the residuary estate of the deceased, if they make an application for the purpose ; or the Court may, if it thinks it is expedient, by reason of the insolvency of the estate, or other special circumstances, grant administration to some other person. Now the widow of the late Mr. James White would be a person who was interested in the residuary estate of the deceased, and the power which is given to grant to some other person is not fulfilled by her. That difficulty was felt by Hill J., who obviously intended that his judgment should be based upon the fact that the widow does not fulfil the terms of the proviso.

But another point was taken, and it was this, that the proviso should be read with, as the rather loose phrase is, s. 160, sub-s. 1, and that the definite terms of s. 160, sub-s. 1, may be disregarded. It is said that those terms which say that the grant is to be to not less than two individuals, must in the particular circumstances referred to in the proviso to s. 162, namely, that there may be a grant to some other person in the case of the insolvency of the estate, or in special circumstances to some other person, be read as meaning a single person. The words, therefore, in the proviso are said to provide that there shall be a single person appointed, and override the express language of s. 160, sub-s. 1. It is said that the decision of *In re Herbert* (1) by the President is an authority for holding that view. I am not sure that that is the effect of that decision, and it does not appear in *In re Herbert* (1) that the matter was fully considered, and although it is not essential at the present time to determine it, perhaps it is right that I should express my view that this proviso cannot be invoked to override, and indeed to repeal, the express words which I have read and which are to be found in s. 160, sub-s. 1.

(1) [1926] P. 109.

It is quite possible, and it would be right, to give effect to the proviso in all its terms, reading the effect of it as still subject to the order or direction that if there is a minority or life interest there must be two individuals. It is said that this s. 162 replaces s. 73 of the Court of Probate Act, 1857. It is true in a large measure, as the title of the Act itself shows, that the Supreme Court of Judicature (Consolidation) Act, 1925, was a Consolidation Act, but s. 73 gave the Court a wide discretion to appoint a person other than the person who would have been entitled to the grant of administration, where there was insolvency of the estate or some other special circumstance; but so far as I am at present advised there was no preceding section in the terms, or which laid down the provisions, now contained in s. 160, sub-s. 1. That section is new, and probably was required because of the new provisions relating to the interest taken by a widow in her deceased husband's estate under the Administration of Estates Act, 1925, and it was just and right that consequential provision should be made to protect the interest of the minority or the life interest. Sect. 160 therefore appears to be a new section which was rightly called for. Under those circumstances it is not possible to say that because s. 73 of the Act of 1857 ceased to exist from that date onwards, and is now replaced by s. 162, s. 162 is meant to replace s. 73 and no more. It is plain that s. 162 must be held to replace s. 73, but it does not require that s. 160 should be disregarded. The inclination of my opinion at the present time, not having had the matter fully argued, is that s. 160 is a section which still stands good, which cannot be overridden by the proviso to s. 162; but in any event the application that is now made by the widow does not fulfil the terms required by the proviso, and I hold that Hill J. was quite right in his judgment, and that the appeal fails.

I will only add this, that upon the materials before us, and upon the statement of counsel, the matter appears to be urgent, and it might have been convenient if an administrator or administrators could have been appointed. The

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question of these race horses is not beyond the capacity of the Court to deal with. Eve J. has already made in the proceedings before him an order for their sale. The lien of the trainer can be protected under the terms of direction for the sale, and I cannot think that it is impossible for Eve J. to deal with the whole matter, urgent though it be, and complicated though it is said to be.

For these reasons the appeal must be dismissed.

SCRUTTON L.J. I agree. Mr. James White died insolvent and intestate leaving a widow and two infant children. His widow applies to the Court for the grant of administration. The question is whether under ss. 160 and 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, the grant under those circumstances can be made to his widow alone. I do not quite follow when s. 160 began; but it is in the same words as s. 12 of the Administration of Estates Act, 1925, which was repealed by the Supreme Court of Judicature (Consolidation) Act; and s. 12 of the Administration of Estates Act is in the same words as certain sections of the Law of Property Act, 1922, and the Amendment Act of 1924, which was repealed by the Administration of Estates Act, 1925, and how much further this process of repealing and enacting goes on I have not been able to ascertain, and as all the counsel who appear are agreed in asking for the order, I have not had any assistance from counsel in ascertaining what the history of the matter really is; but however far that proviso goes back, it does provide in most emphatic terms that if there is a minority, if there are infant children, administration shall be granted either to a trust corporation with or without an individual or to not less than two individuals. That is an express statutory provision that where there are infant children, two people are to be granted administration. Then there is another section, s. 162, which repeats the provisions in the Administration of Estates Act, 1925, which is nearly in the same words as s. 73 of the Probate Act, 1857, which was repealed by the Administration of Estates Act, 1925; and I should like to direct attention next

time this matter is considered to the fact that when s. 73 was passed it was immediately stated by the Probate judge to be very limited in its application, and not to create any power. In future, and when next the matter is considered, counsel will look at the case of *In re Samuel Smith* (1): "The Court has no power under s. 73 of 20 and 21 Victoria, Chapter 77, to grant general administration to a person who, before that Act, would only have been entitled to a grant of administration during the minority of an infant, that section not conferring power to substitute one kind of administration for another, but merely to substitute another person as administrator in the place of the person who would by law be entitled to administration."

Again I have not had the assistance from counsel that one might hope for in following out what was the law under s. 73, but at any rate there was that decision given by Cresswell J. immediately after the section had been passed. Now when one looks at s. 162, and undoubtedly one must read ss. 160 and 162 together if possible, one finds this: Provided that where the deceased died wholly intestate as to his estate (and that is the case here) administration shall be granted to some one or more persons interested in the residuary estate if they make an application for the purpose. The widow is a person interested in the residuary estate of the deceased, and she does make an application for the purpose. The question then is so far, are you to read s. 160 with s. 162 and say "some one or more"—"one," if the matter does not come within s. 160; "more," if it does come within s. 160; and I think that is the true meaning of that part of the section, that if a person interested in the residuary estate of the deceased, in the case where the deceased dies wholly intestate, makes an application, the Court must apply s. 160, and say: "I must make a grant to more than one; you and some one else must apply."

A further point arises on construction which I do not think is directly raised here. Supposing the Court by reason of the insolvency of the estate thinks that administration should

(1) (1858) 27 L. J. (P. & M.) 105.

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not be granted to some one or more of the persons interested in the residuary estate, and therefore grants administration to some other person, does that exclude s. 160, and allow, where there is an infant, administration to be granted to one person, or must s. 160 still be observed, and some other person, which under the Interpretation Act may include two persons, be appointed in order to comply with s. 160 ? The President in *In re Herbert* (1) expressed a view that you can make a grant under those circumstances to one person. It is not necessary in this case strictly to decide that point in my view, but at present I am not at all satisfied that that decision of the President is correct, and I should certainly reserve liberty to consider it, and the Courts below would be free to consider the judgment in this case if the matter should arise on a grant to some other person than a person interested in the residuary estate. This is not such a case, because the application is for a grant to a person interested in the residuary estate who does make an application for the purpose.

For the reasons I have given, I think Hill J. took the correct view of this case. I am afraid the fact that counsel consider that the law should not be enforced must not stop the Court from enforcing the statutes that it is put here to enforce.

SARGANT L.J. I agree. The difficulty here arises from a new provision which has been introduced into the practice of granting administration, no doubt springing from this, that under the new legislation with regard to the descent of property on an intestacy, the property does not pass to persons absolutely, but is settled so that life interests are created, and there may be interests in minors, and so on ; and in view of that, s. 160 of the Supreme Court of Judicature (Consolidation) Act, 1925, provides as an express provision that in a case where under an intestacy a life interest occurs, or there is a minority involved as regards the beneficial interest in the estate, that in that case, unless a trust

(1) [1926] P. 109.

corporation is appointed, administration cannot be granted to less than two persons. That is an express, definite prohibition of the grant to less than two individuals in a case of the kind which has occurred here.

Then comes s. 162, which provides that where the deceased has died wholly intestate, administration shall, unless by reason of the insolvency of the estate or other special circumstances the Court thinks it expedient to grant administration to some other person, be granted to some one or more of the persons interested in the residuary estate of the deceased. Now in this case the widow has applied as being one or more of the persons interested in the residuary estate of the deceased, and it seems to me that that being so, it is impossible to make a grant of administration to her as the sole administrator as being "some other person." She is one of the very persons to whom administration may be granted—"one or more persons"—because she is interested in the residuary estate, and that seems to me altogether incompatible with administration being granted to her as some other person. On that short ground, which is the ground taken by Hill J., it seems to me that the grant to her alone is absolutely prohibited by s. 160; and I think that s. 162 does not in any way conflict with the express provision of s. 160.

On the other point, as to the grant to some other person, of which a creditor is one, there is a decision of the learned President. He has held that where an estate is quite insolvent there may be a grant to a creditor as "some other person" —a single creditor—in spite of the provision of s. 160. It seems to me it is quite unnecessary here to decide whether the learned President was right or wrong in that view. I can see that there is something to be said for it on this ground, that where the grant is being made to a creditor, it may be if the estate is hopelessly insolvent quite unnecessary to consider whether the beneficial interest is settled or not, or whether there is a minority interest or not, because there may be nothing at all in fact in respect of which there is any interest in the minor or in the life tenant, since it is quite

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clear that there will be no surplus at all to give anybody any rights in the matter. Hence I do not for myself desire to say that I think the President was wrong in that decision. I can quite see good reasons for which he might come to that opinion, and therefore I desire entirely to reserve my judgment on the matter until some case arises in which it is really relevant and really necessary for our judgment to deal with that question.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant: *O. L. Richardson.*

Solicitors for other parties: *Swann, Hardman & Co.*

R. M.

C. A. 1927 *Dec.* 7, 19.

[IN THE COURT OF APPEAL.]

THE IKALA.

Shipping—Collision—Damages for Detention—Ship owned by Oil Importing Company—Controlled Import—Maximum annual Quantity carried without extra Chartering—Basis of Assessment.

The plaintiffs' vessel *S.*, inward bound to this country with a cargo of oil, was run into and damaged by a vessel owned by the defendants, who admitted liability for 70 per cent. of the proved damages. The *S.* was detained thirteen days while the repairs consequent on the collision were carried out. The collision occurred in 1917, in war time, and by arrangement with the Government so long as the *S.*, which was owned by an oil importing company, was engaged in carrying oil she was free from requisition. The amount of oil her owners could import was limited to a certain quantity per annum, and in fact the plaintiffs imported during 1917 the maximum quantity allowed.

The registrar, and on appeal the President, on evidence that extra tonnage was chartered, allowed damages for the thirteen days' detention based on the cost of hiring a substituted ship at the market rate for free tonnage:—

Held, that as it appeared that all the extra tonnage chartered during 1917 was chartered in order to carry the full quota and not in consequence of the collision, and that the *S.*, in spite of the detention, made the only other voyage she could have made in 1917, the damages had been assessed on a wrong basis, and that the case must go back to the registrar to assess the actual pecuniary loss, taking into consideration the facts that the plaintiffs imported their full quota of oil during 1917 and that they could not have used the *S.* for any other purpose.

Per Scrutton L.J. In the absence of material on which the loss could be estimated the registrar might have to award damages on the basis of interest on capital value.

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APPEAL by the defendants from a judgment of the President (Lord Merrivale) confirming the report of the registrar on a reference to assess damages.

The plaintiffs (respondents) were the owners of the steamship *Strathfillan*; the defendants (appellants) were the owners of the steamship *Ikala*.

On August 8, 1917, the *Strathfillan*, a steamship of 4353 tons gross register, while on a voyage from Philadelphia to Liverpool with a cargo of oil, was in collision with the steamship *Ikala*, whose owners admitted liability for 70 per cent. of the proved damages. The *Strathfillan* was owned by the Anglo-American Oil Company, an oil importing company, and during the war the importation of lubricating oil was controlled by the Ministry of Munitions. The quota allowed to the plaintiffs for 1917 was 1,188,700 barrels, in respect of which the shipping controller gave space in vessels not owned by the plaintiffs for 657,400 barrels and the plaintiffs had to provide tonnage for the remainder; and, by arrangement with the shipping controller, as long as the *Strathfillan* was engaged in the trade of bringing lubricating oil to this country she was free from requisition. The rate of hire for free ships for carrying oil was fixed by the Ministry of Shipping at 2.30*s.* per ton per voyage. The repairs consequent upon the collision occupied thirteen days, and the registrar, on evidence that the plaintiffs had had to charter other vessels in order to carry the full quota of oil, allowed in respect of damages for detention the sum of 7150*l.*, being thirteen days at 550*l.* per diem.

The defendants appealed. The learned President dismissed the appeal and confirmed the report.

E. A. Digby K.C. and *Balloch* for the appellants. The registrar based his decision on there having been a vessel chartered to take the place of the *Strathfillan*, but there was no evidence that any specific vessel was so chartered, and

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in fact none could have been chartered, for the *Strathfillan*, in spite of the delay, performed the only further voyage she could have made in 1917 and carried her full quota of oil. In allowing 7150*l.* for detention, based on the rate at which a free ship of similar capacity could have been chartered, an erroneous basis has been adopted and one not in accordance with the principles laid down in *The Chekiang* (1) and *The Susquehanna*. (2) It is admitted that the respondents are entitled to some damages, and it is submitted that the basis of assessment should be interest on the capital value of the *Strathfillan*.

C. R. Dunlop. K.C. and *R. F. Hayward* for the respondents. There was evidence to support the registrar's finding that extra tonnage to replace the *Strathfillan* had to be chartered. Neither in *The Chekiang* (1) nor in *The Susquehanna* (2) was the vessel damaged an ordinary merchant ship engaged in trade; interest on capital is a wholly fictitious basis to adopt in the case of a profit-earning commercial vessel.

Cur. adv. vult.

1927. Dec. 19. The following judgments were read :—

SCRUTTON L.J. In this case the owners of the *Strathfillan* have been awarded 7150*l.* for 13 days, 550*l.* a day, detention of their ship by reason of a collision with the *Ikala*. The *Strathfillan* was a ship owned by the Anglo-American Oil Company, bought by them during the war in order to carry for them lubricating oil from the United States to this country, and bought for that trade on the promise of the British Government that she should not be requisitioned so long as she was carrying lubricating oil. It therefore followed that her owners could not charter her for other purposes, and the measure of damages could not be fixed by the rate of hire the owners would have got if they had chartered her. That special damage could not be proved or recovered. The attempt was therefore made, and has so far succeeded, to have another kind of special damage which could be recovered if proved—namely, the cost of hiring another substituted

(1) [1926] A. C. 637. (2) [1926] A. C. 655.

ship. Two voyage accounts were prepared, one before and one after the loss, crediting the ship with freight at the rate then paid to chartered neutrals, and for some reason quite unintelligible to me, with the port charges which the charterer would have to pay under the neutral charter and debiting her with the actual voyage expenses which the owner would have to pay. These voyage accounts brought out profits of 653*l.* and 532*l.* a day respectively, an average of 592*l.* a day. If the 4700*l.* port expenses wrongly credited were deducted the registrar's figure of 550*l.* a day is more nearly reached.

But this measure all turns on proof that a substituted vessel was chartered, and in my view there was no evidence on which this could be found. The import of oil by the shipowners was controlled; they could not import more than 1,188,700 barrels a year, and they did in 1917 import that quantity. The *Strathfillan*, after the collision, made another voyage in 1917 to produce that quota, and could not, if there had been no collision, have made a second voyage. She had no time to make such a voyage, and, if she had, the permissible quota would have been exceeded. The foreign vessels that were chartered during 1917, both before and after the collision, were chartered to fulfil the quota, and would have had to be chartered if there had been no collision. It seems on these facts impossible to say that the special damage of chartering a neutral ship as a substitute for the *Strathfillan* was proved.

What then is to be done? The owners of the *Strathfillan* did in fact lose the use of their ship for thirteen days owing to the collision. Their ship was running in a profit-earning trade in carrying the owners' oil for sale in England, the freight being included in the price for which the owners sold the oil in England. In both *The Chekiang* (1) and *The Susquehanna* (2) the owners were awarded compensation based on interest on the capital value. But the vessel in *The Chekiang* (1) was a war ship, in *The Susquehanna* (2) a Government oil tanker; neither was a trading vessel carrying goods for her owner's profit. It seems to me that the proper

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measure of damages in such a case is the loss which the owner sustains by losing the use of his profit-earning vessel in the trade of carrying his own goods for sale for thirteen days. It must also be considered that the price of the goods carried was limited, and the quantity of goods to be carried was limited. The judgment of Lord Sumner in *The Chekiang* (1) must also be considered with his comments on the difficulties of assessment.

The case must go back to the registrar for the purpose of assessing the compensation for loss of use of the vessel for thirteen days on the above basis. If he is given no materials on which he can estimate such loss, he may have to fall back on interest on capital, but I see no reason why he should be driven to this result.

The appellants must have the costs of the appeal here and before the judge.

ATKIN L.J. In this case I cannot find any reliable evidence which supports the registrar's finding that by reason of the thirteen days' delay of the *Strathfillan* caused by the collision the owners chartered other vessels. In my view the circumstance that the plaintiffs were only allowed to import a specific quantity of lubricating oil in the year in question, and could not use the *Strathfillan* for any other purpose, and that the *Strathfillan*, in spite of the delay, performed the only further voyage which she could make that year, and that the plaintiffs imported that year their full quota, make it impossible for this finding to stand. The case must be referred back to the registrar to find the actual pecuniary loss to the claimants. In considering this I think he will have to take into account the circumstances above mentioned. It may be useful to point out that whatever may be the general rule as to the loss of use of vessels in commercial service, there may be circumstances in which the "infructuous use" of the vessel for the period of detention does not give rise to substantial pecuniary loss. To use an analogy from other chattels, the loss of use for a month of a harvesting

(1) [1926] A. C. 637.

machine in the winter or a snow plough in the summer would cause little or no pecuniary loss. I think the same consideration would apply to a vessel used only in a seasonal trade, or so fixed by regulation or charter that the delay does not prevent or even affect the only commercial use to which the vessel can be put. I do not think these considerations conflict with the principles enunciated in *The Chekiang* (1) and *The Susquehanna* (2) which the registrar will necessarily apply.

EVE J. I agree.

Appeal allowed.

Solicitors for the appellants: *Godfrey Warr & Co., for Batesons & Co., Liverpool.*

Solicitors for the respondents: *Thomas Cooper & Co.*

E. C. M. T.

PROBATE.

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Nov. 29, 30;
Dec. 20.

BARKWELL *v.* BARKWELL.

Probate — Will — Execution — Contents — Presumption of Revocation — Parol Evidence of Contents of revoked Will — Declarations of Testator — Admissibility.

No rule of the common law as to evidence is contravened by the admission of secondary evidence as to the contents of a lost document, and when the due execution of a no longer existing testamentary paper is established, and its contents are shown to have included a clause revoking previous papers, those papers are no longer testamentary from the moment of such execution.

Quaere whether declarations by a testator made before execution of an intended will as to the contents thereof are admissible. Declarations of a testator made after execution of the will are not admissible as to the fact of execution itself, as tending to contravene the statutory requirements as to execution: but they are admissible to prove the contents of a paper otherwise shown to have been properly executed, and no longer in existence.

THE plaintiff, William Samuel Boyers Barkwell, as surviving executor, claimed probate of the last will dated July 16, 1891, of Richard Herbert Barkwell, who died on October 6, 192

(1) [1926] A. C. 637. (2) [1926] A. C. 655.

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and that letters of administration to the estate of the deceased which had been granted to the defendant, Herbert Boyers Wood Barkwell, should be revoked. The case of the defendant was that the will propounded had been revoked by a later will dated in 1901, and that a series of wills dated respectively in 1908, 1910 and 1925 had revoked the will of 1901 and each other in turn, and that as the will of 1925 was in the possession of the deceased and not forthcoming at his death the legal presumption was that the deceased had revoked it and died intestate.

By his reply the plaintiff pleaded to the execution of all the wills subsequent to 1891 and to the alleged revocation by them of previous wills.

The plaintiff was a brother of the deceased and the defendant the son of the deceased.

There was evidence of declarations by the testator in 1901 that he had made a will leaving all his property to the defendant. Amongst the papers of the deceased was found the completed draft of a will dated in August, 1908, disposing of all his property and purporting to have been duly executed, but no evidence was forthcoming of its actual execution. In April, 1910, the testator produced to a witness a paper writing, which he described as a will, appointing that witness his executor. As described by the witness this paper appeared to have been a formally executed will. In 1925 the testator caused a printed will form to be purchased for him, identified to a witness the writing upon it as a will, and, as was proved, duly executed it. It was established that the form contained a general clause of revocation of all prior wills. At the death of the testator no wills of either 1901, 1908, 1910 or 1925 could be found, and the presumption accordingly arose that the deceased in whose possession the will of 1925 had remained had destroyed it animo revocandi.

Evidence was tendered of numerous declarations by the deceased as to various wills executed by him since 1891 and of his expressions of intention to revoke wills made by him.

The action had been set down for trial by a special jury, but at the hearing the order for a jury was discharged by

consent, and the trial proceeded before the President (Lord Merrivale) sitting without a jury.

Cotes-Preedy K.C. and *R. Bush James* for the plaintiff. It is not sufficient to prove the mere execution of a later will; its revocation of a former will, either expressly or by implication, must be further proved: *Hellier* v. *Hellier.* (1) Declarations by the testator as to the contents of his wills made after their execution are not available for this purpose. *Sugden* v. *Lord St. Leonards* (2) will be relied on contra, but that case should be read in the light of *Woodward* v. *Goulstone* (3) and *Atkinson* v. *Morris* (4), which throw doubt upon it.

As to the will of 1925 the defendant is relying upon the legal presumption of its revocation arising from its not being found at the death of the testator, and it is not open to the defendant to give secondary evidence of its contents—e.g., that it contained a general clause of revocation. The law on this point may be thus summed up: "Since a will which has been destroyed animo revocandi cannot be revived by a subsequent codicil, for not being in existence it cannot be incorporated in or republished by such codicil by reference, it follows that secondary evidence of what the contents of the destroyed will were is not admissible": Williams on Executors, 11th ed., p. 258, and cases there cited in support of the proposition, including *Newton* v. *Newton* (5) in the Court of Probate in Ireland.

Parol evidence of intention to revoke is clearly inadmissible: *Newton* v. *Newton.* (5)

[LORD MERRIVALE P. Is not the question what were the contents of a revoked will a question of fact? He referred to *Brown* v. *Brown.* (6)]

Sir Patrick Hastings K.C., *Bayford K.C.* and *Frampton* for the defendant. *Sugden* v. *Lord St. Leonards* (2) has never been overruled, and the only real comment upon it in

(1) (1884) 9 P. D. 237.
(2) (1876) 1 P. D. 154.
(3) (1886) 11 App. Cas. 469.
(4) [1897] P. 40.
(5) (1861) 5 L. T. (N. S.) 218.
(6) (1858) 8 E. & B. 876.

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Woodward v. *Goulstone* (1) and *Atkinson* v. *Morris* (2) is that mere declarations cannot be substituted for the requirements of the Wills Act as to execution. The present issue arises as to contents and not execution. In *Brown* v. *Brown* (3) Lord Campbell C.J. said: "I feel no doubt that evidence of the contents of the second will" (which was proved to have been executed, but could not be found) "was properly received at Nisi Prius; for it was the common case of a lost instrument; and parol evidence of the contents of a lost instrument may be received as much where it is a will as if it were any other." That case turned upon the presence in the lost will of a clause of revocation. Sufficient evidence has been given to show that the earlier wills revoked each other and that the last will of 1925 contained a revocation clause. The testator was peritus in will making, and the maxim "Omnia praesumuntur rite esse acta" applies. The intention is immaterial. The evidence is cogent that in fact he died intestate.

Cur. adv. vult.

Dec. 20. THE PRESIDENT (LORD MERRIVALE) delivered the following written judgment: In this suit as to the estate of Richard Barkwell deceased legal questions of considerable importance were raised, and I thought it advisable to give considered reasons for the conclusions at which I had arrived. The deceased, whom I will call the testator, died at an advanced age, possessed of property estimated as of the gross value of about 16,000*l*. He was a man of eccentric habits, very pronounced views on many subjects, much addicted to what may be called testamentary exercises, and very apt to change his testamentary intentions upon sudden provocation. In his later life he also showed himself apt in correspondence with his relations overseas to attract them to him upon a prospect of benefits to be secured to them by will. During the time under review the testator's differences with his wife, and in recent years an unfavourable view he had taken of his son, the defendant,

(1) 11 App. Cas. 469. (2) [1897] P. 40.
(3) (1858) 8 E. & B. 876.

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were powerful incentives in his decisions about the disposal of his estate. The plaintiff is a brother of the testator. He seeks to establish a will made in July, 1891, before the birth of the defendant, but in the midst of his father's disagreements with his mother. The plaintiff lived in Canada, and the will was sent to him there. He is the survivor of the two executors named in the will. The plaintiff has brought in a will of 1888—apparently holograph—it commences with a revocation clause, and besides some exiguous gifts to the wife, consists mainly of dispositions in favour of the plaintiff and others of his family. The will propounded by the plaintiff also begins with a revocation clause of like tenor with that of 1888.

By written and oral evidence it was established that in 1901 the testator declared that he had recently made a will leaving all he possessed to his son, the defendant. In 1902, his solicitor, Mr. Nichols, drafted a will to dispose of all the testator's property, which he suggested should take the place of an instrument the testator had apparently forwarded to him, as to which the solicitor wrote: "The inconsistent statements and directions, which you made in your so called will, would only lead to the whole matter being thrown into Chancery for the protection of your trustee." Amongst the testator's papers there was found at his death the draft or copy of a purported will in his handwriting, disposing of all his estate, bearing date August, 1908, and representing itself to have been signed by the testator and two witnesses. Nothing was known of this document, however, except what appeared on its face. In April, 1910, the testator produced to Mr. Forbes, who was called before me, a paper signed by himself, which he described as his will and as to which he said he had thereby made Mr. Forbes his executor and left him one-fourth and his remaining son three-fourths of his property. As described by Mr. Forbes the paper appeared to be in the form of a will with the attestation clause in the usual position.

In 1925 the testator identified as "a will" in the making of which he was engaged the writing upon a will form recently

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purchased at his direction, and after he had completed the writing he signed the document in the presence of two witnesses, Alfred Day and Emily White, who duly attested his signature, and one of whom was called as a witness. Upon this instrument the questions between the parties mainly depend.

After the death of the testator search was made and, no will being found, the defendant as next of kin made the necessary affidavit for obtaining letters of administration, and a grant was thereupon made in the usual course. Shortly afterwards the plaintiff arrived in England and produced the will of 1891 for which he claims probate.

At the hearing proof was given of due execution of the will propounded by the plaintiff, and the substantial question in the case came to be whether it has been revoked. Counsel for the defendant submitted that, whatever else was in doubt, there could be no doubt that the testator at all material times intended to revoke the will of 1891 and to leave it revoked. They also claimed to have proved the contents of a will of August, 1908, and the contents and execution of the will of 1910, each of them revocatory of every anterior will. They likewise contended that they had shown that in the spring of 1925 the testator made a will which expressly revoked any earlier will. Finally, as no such will could be found at the testator's death, and many letters he wrote in 1925 discussed his testamentary position on the footing that this will had been revoked, they submitted that intestacy was proved.

On the plaintiff's behalf two main contentions were made. It was argued that, on a correct view of the authorities, ex post facto declarations of the testator as to the various wills said to have been made by him after 1891 are inadmissible. It was also urged that, inasmuch as the alleged will of 1925 was asserted by the defendant's pleadings to be a revoked will, no secondary evidence of its contents could be admitted.

The question what declarations of a testator are admissible in evidence to establish testamentary dispositions stands to-day where it was left by the statement by Lord

Herschell L.C. in the House of Lords in *Woodward* v. *Goulstone* (1) upon consideration of a judgment of the Court of Appeal in relation to this matter in *Sugden* v. *Lord St. Leonards* (2), that is to say, it remains a doubtful and difficult one. So far as regards the admissibility of statements of a testator made before the execution of the will as to the contents of a will "in the making" *Sugden* v. *Lord St. Leonards* (2) confirms numerous earlier decisions, and there is no uncertainty. The Court of Appeal in *Sugden* v. *Lord St. Leonards* (2) held that certain statements made by the testator in that case after the execution of a will were admissible, and as matters stand—notwithstanding the doubts expressed in *Woodward* v. *Goulstone* (1)—the judgment in *Sugden* v. *Lord St. Leonards* (2) must be regarded here as having declared the law so far as it has been authoritatively declared.

As to the application of the rule which was considered in *Sugden* v. *Lord St. Leonards* (2) two well known principles are to be borne in mind. Inasmuch as the Wills Act, 1837, denies all effect to any will unless it shall be made in writing and executed in the prescribed manner, that statute plainly ought not to be evaded by the admission of parol statements made after the event to make out execution. Under the common law, however, which since 1857 has governed proceedings in this jurisdiction, a fact which is in issue may, subject to the provisions of the Wills Act, be proved by any kind of lawful evidence, provided it be the best available. To exclude a subsequent statement of a testator as to the fact of execution of a will is one thing. To exclude, or to admit his statements as to the contents of a writing no longer in being is another. It may be that the observance of this distinction will some day help in the decision of the vexed question what statements of the testator can be given in proof.

In the present case it is not pretended that there is legal proof of due execution of any will of the testator in 1901, 1902 or 1908. A negative finding on the allegations of the defence as to the wills suggested to have been made between 1891 and 1910 is not resisted. As to the paper produced to

(1) 11 App. Cas. 469. (2) 1 P. D. 154.

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Mr. Forbes in 1910 there are reasons for believing it was a duly executed will. It bore the testator's signature. It had what appeared to be an attestation clause. It was described as his will by a man uncommonly versed in such matters. I think a verdict of a jury that it was duly executed might be sustained, but I do not make such a finding, because no signatures of witnesses were made out, and I am not convinced that they were there. The case depends then upon the view to be taken of the alleged will of 1925. As to this instrument there is the evidence of one of the witnesses of the fact of execution. There is a good deal of testimony as to statements of the testator before and during the preparation of the document and after the date when it was signed concerning the contents or effect of what he called his will. Counsel for the plaintiff, however, contended that apart from the question of admissibility raised in *Woodward* v. *Goulstone* (1), none of this material is available by reason that the will, if it ever existed, is declared by the defendant to have been revoked in the lifetime of the testator.

To the proposition that a revoked will must be treated as non-existent there are obvious limitations. No one would doubt, I suppose, that after the death of the testator a document executed by him as a will, but afterwards revoked, could be used to show his knowledge during life of matters of fact of which it contained evidence. Again, in a suit wherein due execution, validity, revocation and republication come in question as to one will its origin and its contents may be among the main facts for the consideration of the Court. Further, in the case of a testator who has made successive complementary dispositions by will or codicil and has revoked some of them by a will subsequently itself revoked by cancellation, the ascertainment of the true effect of these several testamentary acts would be impossible if the rule is as contended, even though every material document were in being. Yet no rule of evidence under the common law, so far as I know, presents any such impediment to the administration of justice.

(1) 11 App. Cas. 469.

What is said for the plaintiff is that the rule contended for has been established by various decided cases based upon the Wills Act of 1837, and that it is so set forth in text-books of recognized authority. The citation mainly relied upon and which does seem to be in point is that made from Williams on Executors, 11th ed., p. 258, in the words following: "Since a will which has been destroyed animo revocandi cannot be revived by a subsequent codicil, for not being in existence it cannot be incorporated in or republished by such codicil by reference, it follows that secondary evidence of what the contents of the destroyed will were is not admissible." None of the cases cited in Williams is a direct authority for the proposition therein enunciated. Indeed they seem on the whole to impugn it. In the Irish case of *Newton* v. *Newton* (1), which is one of these decisions, Keating J., who tried the action, said this: "If the testator made no will or codicil subsequently to a will the execution of which was proved and on his death the will of that date could not be found, and there is no evidence to rebut the presumption that he had himself destroyed it and consequently parol evidence could be given of its contents, and it became necessary to go into such evidence to show that it contained a clause of revocation .... then the draft will might be good evidence of its contents at the time of execution." There is, moreover, something like direct authority against the proposition made on behalf of the plaintiff. *In the Goods of Hodgkinson* (2) is a case in point. There a will had been revoked by the testator by cutting off his signature. Evidence of its contents was received, which showed that this will had revoked some only of the dispositions in an earlier will. In this Division and in the Court of Appeal the effect of the revocation upon the earlier will was adjudicated upon. Here it was held that the earlier will stood entire and unaffected by the will made later and revoked, but the Court of Appeal decided that the revoked will had effectually rescinded the dispositions in the earlier will, to which it related, and that probate of

(1) 5 L. T. (N. S.) 218, 224. (2) [1893] P. 339.

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the earlier will must be limited to the parts of the testator's estate to which the second will did not relate. The view taken in *Hodgkinson's* case (1) is entirely in accordance with the judgment given in the well known case of *Brown* v. *Brown* (2), decided in the Court of King's Bench in 1858. There an heir at law was claiming realty as upon an intestacy, and he was held entitled in support of an allegation of intestacy to give evidence of the contents of a will which he alleged to have been revoked, in order to show that the will contained a clause revocatory of an earlier will.

It is proper to say that the passage in Williams, which is relied on, has not the authority of Sir Edward Vaughan Williams and has no place in the editions of his work published during his life. Looking at the matter on principle, there can, I think, be no doubt as to the true rule. A question of fact is in dispute—namely, whether the will of 1925 contained a revocation clause. The document cannot be found, and presumably it was destroyed by the testator. Apart from statute, the evidence to be required is what is called in the opening sentences of Roscoe's Nisi Prius on evidence: "The best evidence, or rather the highest kind of evidence of which the nature of the case admits." The only relevant statute is the Wills Act, 1837. Sect. 9 of the Act enacts that no will shall be valid unless it shall be in writing and executed in the prescribed manner. Sects. 18 and 20 prescribe the means whereby a will may be revoked. Sect. 22 directs that no revoked will shall be revived otherwise than by re-execution or by codicil duly executed showing an intention to revive. All that the statute really requires here is that I should see whether what the defendant seeks to do is to revive the will of 1925. In my judgment he does not. What he seeks is to show that when the testator attached his signature to the will of 1925, it was, within the terms of s. 20 of the Wills Act, "a will or codicil . . . . or some writing declaring an intention to revoke." Sect. 24 of the Act has no relevant effect. The language of this section is plain. A will "is to be construed with reference to the real

(1) [1893] P. 339. (2) 8 E. & B. 876.

estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." The intention which appeared by this will was that upon its execution previous wills would be revoked. Cases beyond number have made it clear that words of revocation contained in a will operate immediately upon its execution, so effectually, that without some express act of revivor the revoked testament has thenceforward no existence. The principle is illustrated in *Brown* v. *Brown*. (1)

What remains is to ascertain whether the writing of the testator, witnessed by Alfred Day and Emily White in 1925, was expressly or by implication a will which revoked any will previously in being. I know as to the substance of the transaction many material facts. The testator, for a substantial period before his signature was witnessed had been engaged, according to his own statement, fortified by an abundance of corroborative circumstances, in the preparation of a will. He wrote upon a printed form what he said was his will. He named persons whom he intended to benefit. He concluded the document with sentences expressive of pious opinions such as he had often expressed in the like connection. The printed form was one of two brought to him by his messenger from the shop of a firm of law stationers, and it contained a revocation clause in absolute terms. Bearing in mind the practical experience of the testator, the knowledge he had of will making, and the numerous occasions on which he had demonstrated it, I am satisfied that the document witnessed by Mr. Day and Miss White was the will of the testator, and that he thereby in express terms revoked all earlier wills. Having ascertained the fact of revocation, I have no concern with the declarations of the testator, sooner or later, as to the contents of the will in question, or with any statements concerning subsequent testamentary acts, or intentions. No later will appears, and in respect of these matters the extent of the rule of law,

(1) 8 E. & B. 876 ; see also *In the Goods of Brown* (1858) 1 Sw. & Tr. 32.

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which excludes some declarations and includes others, becomes immaterial.

The defendant is entitled to judgment in the action. I therefore pronounce against the will propounded by the plaintiff, and direct that the letters of administration granted to the defendant in his proceedings in common form be handed out to him.

Solicitors: *Barrow, Rogers & Co.*; *Reid Sharman & Co.*

R. M. M.

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June 25;
July 16.
1928.
Jan. 24.

RECTOR AND CHURCHWARDENS OF THE PARISH OF SAINT NICHOLAS ACONS IN THE CITY OF LONDON *v.* LONDON COUNTY COUNCIL.

[IN THE CONSISTORY COURT OF LONDON AND IN THE ARCHES COURT OF CANTERBURY.]

*Ecclesiastical Law—Faculty—*47 *&* 48 Vict. *c.* 72, *s.* 3—"*Buildings*"—"*Upon any disused burial ground*"—*Brick Electrical Transformer Chamber in closed Churchyard with Roof not projecting above Ground Level—Jurisdiction—Prior decision of Consistory Court given in unopposed Cause—How far a binding Authority.*

A brick built chamber intended to contain machinery for transforming electric current, with a roof of asphalt supported by steel girders and reinforced concrete, but so constructed that the roof does not project above the ground level, if erected in a churchyard closed for burials by Order in Council, would constitute a "building" erected "upon a disused burial ground" within s. 3 of the Disused Burial Grounds Act, 1884, and an Ecclesiastical Court has no jurisdiction to grant a faculty authorizing the erection of such a building in such a situation.

In re St. Nicholas Cole Abbey and *In re St. Benet Fink Churchyard* [1893] P. 58 overruled.

THIS was a cause of faculty in the Consistory Court of London. The following statement of facts is taken from the judgment of the CHANCELLOR (F. H. L. ERRINGTON, Esq.):—

This is an application by the rector and churchwardens of the parish of St. Nicholas Acons in the City of London

asking for the sanction of this Court to an agreement which they have come to with the City of London Electric Lighting Company and to which agreement I will refer in a moment. Now the facts are these. The churchyard in question is the churchyard of the parish church and is situate in Nicholas Lane, which I understand is just off Lombard Street. It was closed for burials in 1854. The City of London Electric Lighting Company have a transformer chamber under Nicholas Lane. It is a sub-station and one of their main, if not their main, sub-stations for supplying electric light and power to a certain area in which they act in competition with a company, I think called the Charing Cross City Undertaking Company. The Electricity Commissioners desire a certain standardization of supply and for that purpose it is desirable, though not necessary, for the Electric Lighting Company to have larger transformer machines. The present space is not sufficient. They cannot increase that space either across the lane, which is bounded on the other side of the churchyard by various buildings, nor can they in fact increase it up or down the lane. In the first place, they would get no further actual space, and again, they would probably be interfering with various pipes and wires which have been laid down by the local authority. If, therefore, they are to use these larger machines it is almost necessary for them that they should, if possible, be given permission to place a transformer chamber under the churchyard. Now they already have certain rights in connection with the churchyard. On May 12, 1892, under the sanction of a faculty then granted by this Court (1), they were licensed to use, for a period of twenty-one years at a rent of 20*l.*, a portion of the ground within the churchyard for the purposes of an entrance to their transformer chamber in Nicholas Lane. On February 18, 1914, again under a faculty granted by this Court (2), they were licensed to use that entrance

(1) The case is reported [1893] P. 66*n*.

(2) Unreported. The faculty was granted by Sir Alfred Kempe. It was stated at the hearing of this case that it was decreed in chambers, no formal judgment being delivered.

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for another twenty-one years at a rent of 30*l*. They are now asking for the additional use of so much of the churchyard as is necessary for the purpose of excavating and placing in the excavated space an enlargement of their transformer chamber, and they have accordingly entered into a provisional agreement with the rector and churchwardens dated April 4, 1927, under which they are to have a further licence for thirty years and the rent is increased to 150*l*. That agreement has, in fact, been approved both by the Parochial Church Council and by the Vestry, the Vestry having recognized that the amenities of the churchyard will not be interfered with. The longer period of thirty years is suggested, having regard to the expenditure which the company will have to incur in the excavation and formation of this chamber. That expenditure is estimated to amount to the sum of about 4000*l*. Now this petition was presented on April 6 of this year. The citation issued on May 8, and no appearance was entered in opposition. It is a rule, however, of this Court in these cases to give notice to the London County Council of any applications concerned with a disused burial ground, or with an open space under the Open Spaces Act. (1) Notice was accordingly given to the London County Council, and they have entered an appearance and now appear to oppose the granting of this faculty.

The transformer chamber which it is proposed to place in the churchyard, or under it, is a brick built structure with a roof of asphalt supported by wrought steel girders and by reinforced concrete. That roof is under the surface of the

(1) The Metropolitan Board of Works (Various Powers) Act, 1885 (48 & 49 Vict. c. clxvii, s. 56) enacts that "The Board shall be and they are hereby constituted the authority for preventing the violation of and for enforcing the due observance of the provisions of the Disused Burial Grounds Act, 1884, within the Metropolis, and they may from time to time institute and prosecute all such legal proceedings and do all such acts matters and things as may in the opinion of the Board be necessary or expedient for preventing the violation by any person and for enforcing the due observance by all persons of the provisions of the said Act within the Metropolis."

By virtue of s. 40, sub-s. 8, of the Local Government Act, 1888 (51 & 52 Vict. c. 41) "the powers, duties and liabilities of the Metropolitan Board of Works" were transferred to the London County Council.

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churchyard, and the only parts of the transformer chamber which will, so to speak, emerge into the churchyard, are two ventilators which, I think, are something like nine inches above the surface of the churchyard, and they will be practically concealed from sight by certain beds of flowers which the company undertake to place there. So far as noise is concerned, there will be no noise connected with the machines which are used in the transformer chamber; they are, in fact, as I understand, motionless machines, but in any case the company have given an undertaking to the Westminster Bank, who have a lease of adjacent premises (being an undertaking which, if the faculty were granted, could be included in the faculty itself), that they will not employ any noisy machinery in this chamber. So what is contemplated is a chamber mainly under the churchyard, but with two ventilator lights just above the surface, and containing noiseless machinery, machinery which is simply used for transforming current.

On June 25, 1927, the cause came on for hearing before the Chancellor of the Diocese of London.

Wightman Powers appeared for the petitioners. There was no opposition. Witnesses were heard in support of the petition, after which the hearing was adjourned in order that notice of the application might be given to the London County Council.

On July 16, 1927, the cause was again called on when *Hon. Stafford Cripps K.C.* and *G. G. Honeyman* (with them *Powers*) appeared for the petitioners and

Sydney Turner appeared for the London County Council and contended that the Court had no jurisdiction to decree the faculty prayed.

The arguments sufficiently appear from the judgment.

THE CHANCELLOR [having stated the facts as above set out continued as follows:] Now, in these circumstances, there are two questions which arise. The first is, whether that transformer chamber and the dwarf wall with railing

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upon it, which at present protects the entrance to the chamber in Nicholas Lane, and which will have to be somewhat extended in view of this further structure, are buildings within the Disused Burial Grounds Act, 1884, as amended by the Open Spaces Act, 1887. Sect. 3 of the Act says: "it shall not be lawful to erect any buildings upon any disused burial ground" except for certain purposes which are plainly not within this application. This first question is, therefore, whether the construction of the chamber which is proposed to be placed in the churchyard, is a building upon the churchyard. The second question is one of jurisdiction, if this Court comes to the conclusion that it is not such a building. If it is such a building the Court has obviously no jurisdiction to grant a faculty. Now, in the first place, is the construction a building? In some cases a question of difficulty arises with regard to the meaning of a building. It may have different meanings according to the subject-matter with which it is concerned. For instance, in Acts of Parliament dealing with gas or water supply, or for similar underground supply, cases have gone far in deciding that any erections, such as underground arches, are a building. I think these Acts must be construed, as they always have been, according to the subject-matter. It is quite obvious that, in dealing with workings which are entirely underground, an underground structure or erection, if interfered with, would be a building. But I can feel no doubt that this transformer chamber is a building. It is built with brick walls and a roof, and it seems to me really past argument that it is not a building. But then the question remains, is it a building erected "upon" the churchyard? The argument that it is not such a building rests upon a case in the House of Lords, and the case decided by my predecessor in 1892. I will deal with the latter first. It is the case of *In re St. Nicholas Cole Abbey*. (1) That was an application under circumstances which it would be very difficult to distinguish and which I do not propose to distinguish from the present circumstances.

(1) [1893] P. 58.

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In that case, or rather in two cases, transformer chambers were allowed to be constructed in the churchyard. Now, it is noticeable as a very curious fact in that case that, so far as I can see, the Disused Burial Grounds Act, which had then been in operation for some years, is nowhere mentioned. I must also point out that the grant of the faculty was unopposed. The Chancellor in giving his judgment in that case nowhere, so far as I can see, deals with the Act. He refers to his jurisdiction, but I think the reference to jurisdiction is a reference to the ordinary jurisdiction exercised under ecclesiastical law. He does not seem to me in fact to have dealt directly with the question which is now before me. On the other hand, it is a decision, and it is strongly contended that I must follow it. The other decision is one in the House of Lords, and is the case of *Paddington Corporation* v. *Attorney-General* (1), and there is a passage which has been read from the judgment of Lord Halsbury, the Lord Chancellor; but before dealing with that judgment one must necessarily look at the subject-matter with which the House of Lords was dealing. The House of Lords was dealing with a question of whether a hoarding, which had been erected on the churchyard for the purpose of preventing adjacent owners from acquiring rights of light, was a building within this Act of 1884. What Lord Halsbury says, and he is dealing with that section of the Act, is, "In the first place, I think it is necessary to consider what is the meaning of the prohibition contained in either of the Acts referred to. I am of opinion that it meant what it said—that the space was to remain unbuilt upon. It is to be disused as a burial ground, but it is not to be used as building ground—that is the meaning of it; and it appears to me that anything that approaches to the character of a building, whether temporary or permanent, is obviously within the prohibition." Applying that to this case, this churchyard is to remain unbuilt upon. It is to be disused as a burial ground, but it is not to be used as building ground. He is dealing there, of course, with a temporary building, a hoarding,

(1) [1906] A. C. 1, 3, 4.

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but the Lord Chancellor says: "whether temporary or permanent is obviously within the prohibition." Now, if I were to stop there, it seems to me that this judgment strongly supports the view that the present building is a building within the meaning of the Act, but I must go a little further—"I entirely agree with Buckley J. that in the books there may be found a great variety of cases where, with reference to the subject-matter of the covenant and the meaning of what was in question between the parties, a screen or some erection of that nature might be considered a 'building' with reference to some covenants and might not be considered a building with reference to others. The subject-matter to be dealt with is to be looked at in order to see what the word 'building' means in relation to that particular subject-matter." He goes on, and this is the part on which Mr. Cripps has mainly relied: "I have to look at the word 'building' here with reference to this subject-matter and what the Act of Parliament was doing. It is very obvious, I think, that what was intended to be done was to keep this disused burial ground from being used as building ground; to keep it as a place of exercise, ventilation, recreation and what-not, to prevent anything being done in the nature of building, which would interfere with or restrict the free and open use of these spaces as constituted under the statute." Now, in my opinion, these last words must be read in connection with the fact that the subject-matter was a hoarding. On the other hand, I think the previous words which I have already referred to are more in the nature of a general, perhaps dictum, at all events a statement of the law. I will deal in a moment with the question of whether I am bound by the earlier decision of Chancellor Tristram, but looking at this application from the point of view first, that this is a building, and secondly of Lord Halsbury's observations that the object of the Disused Burial Grounds Act was that "the space was to remain unbuilt upon and not to be used as building ground" I must come to the conclusion that this is a building within the Act, subject to one particular point, that is, that the Act uses the words

"buildings upon," but does not use wider words such as "upon or in connection with" or expressly include a building which is mainly under the surface. I find myself unable, however, to attach any particular importance to the word "upon." I think, having regard to the general form of the covenants which are used for restrictive purposes, that when there is a covenant not to do something, whether it is an erection of buildings or anything else upon the premises, that includes doing it upon any part of the premises which, of course, means both above ground and below ground. There is an additional reason in the subject-matter with which the Act is dealing. The Act is not dealing as sometimes in the Open Spaces Act, with the soil or surface; it is dealing with the burial ground which is consecrated ground, not only as to the surface, but, of course, below the surface. It is dealing with one subject-matter. That subject-matter is the burial ground, whether below the surface or above the surface. I come to the conclusion, therefore, that in this Act the words "any buildings upon a burial ground" include such transformer chamber as is now contemplated, and taking that view myself, the question remains whether I am bound to disregard my own view and to follow this decision of Chancellor Tristram, which was given so long ago as 1892, but which, so far as my knowledge of the cases goes, has not, in fact, been followed, although it has never been dissented from. My attention has been called by Mr. Cripps to a case of the *Grosvenor Chapel, South Audley Street* (1), in which the Chancellor follows, so far as I understand it, possibly and probably against his own view, a decision of Chancellor Tristram which, as he said, was of thirty-nine years standing and had never been reversed. He says: "The case was fully argued on both sides." Now, of course, a great distinction is always necessarily drawn between cases which are opposed and cases which are unopposed. The difference is not slight. The difference is very material. It may well be said, and in a sense it is true, that a judge sitting in this Court in 1892 so

(1) (1913) 29 Times L. R. 286.

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shortly after the passing of the Disused Burial Grounds Act must have had that Act in his mind. Whether that may be so or not, there is a great difference between having an Act in your mind and an Act being impressed upon you in argument, and in that case, as I have said, there was no argument. I am myself not aware of anything or any decision which binds me to follow, contrary to my own view, a decision which was come to in an unopposed case and which, as I think, is contrary to Lord Halsbury's judgment in the House of Lords. To my mind that judgment gives a good working rule for the interpretation of this Act. We must have regard to the subject-matter. I find myself unable to follow the decision of Chancellor Tristram, and I come to the conclusion that I have no jurisdiction to grant this application. In those circumstances it is unnecessary for me to go into the further question of discretion, as to which I realize that there would be very strong arguments, some of which Mr. Cripps has indicated, in favour of that discretion being exercised so as to allow this building. I come to this conclusion on the construction of the Act alone, and if, as may well be, there is an appeal from my decision, I think it far better and fairer to the parties who are appealing that the Appeal Court should not be hampered in any way by the question of how I should have exercised my discretion. I confine myself, therefore, to the question of jurisdiction under the Act itself, and, as I have said, I come to the conclusion that I have no jurisdiction to grant this application.

From this decision the petitioners appealed to the Court of Arches.

1928. Jan. 24. The appeal came on for hearing before the DEAN OF THE ARCHES (SIR LEWIS DIBDIN D.C.L.).

A. T. Lawrence K.C. and *G. G. Honeyman* (with them *Powers*) for the appellants.

Hon. Sir Malcolm Macnaghten K.C. and *Sydney Turner* for the respondents. The arguments were similar to those in the Court below. The following cases were cited in addition

to those mentioned in the judgment below: *Thompson* v. *Sunderland Gas Co.* (1); *Ex parte Willey* (2); *Graham* v. *Newcastle-on-Tyne Corporation* (3); *Auto-Mart (London), Ld.* v. *Chilton.* (4) In the course of the argument the Dean of the Arches stated that he had no doubt that the judge in the Court below was not bound to follow *In re St. Nicholas Cole Abbey* (5), inasmuch as it was not argued on both sides and the statute was not referred to.

THE DEAN OF THE ARCHES. This is an appeal from a decision of the learned Chancellor of London, in which he held that he had no jurisdiction to grant a faculty for the creation of a transformer chamber in the closed churchyard of St. Nicholas Acons—the chamber to be underground, except that two ventilators would emerge a few inches above the surface of the ground. The faculty was sought by the rector and churchwardens of the parish in order to give effect to a provisional agreement which they had made with the City of London Electric Lighting Company. The faculty was opposed by the London County Council.

The points involved are short.

The Disused Burial Grounds Act, 1884, s. 3, enacted, "after the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground," except for purposes which it is admitted are not relevant to the present application.

In the first place would the proposed chamber be a "building"? Why a room with brick walls and an asphalt roof on steel girders should not be a building because it is for the most part sunk below the surface of the ground I cannot conceive. I agree with the view taken by the learned Chancellor on this point, fortified, though I should have thought it hardly necessary, by the observations of Lord Halsbury in *Paddington Corporation* v. *Attorney-General* (6), made with special reference to the use of the word in this

(1) (1877) 2 Ex. D. 429.
(2) (1883) 23 Ch. D. 118.
(3) (1892) 9 Times L. R. 130.
(4) (1927) 43 Times L. R. 463.
(5) [1893] P. 58.
(6) [1906] A. C. 1.

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enactment. In the second place will the chamber if erected be *upon* the disused churchyard? Here again I agree with the view taken by the learned Chancellor. The burial ground includes the whole ground, not the surface only. The surface may be excavated or the levels altered and a building originally built for the most part underground may very easily by excavation, such as is common enough in this city, cease to be so. The fact is that the building is as much upon the ground whether it be built on its present surface or on earth below its present surface.

The learned Chancellor's judgment deals fully and, if I may say so, convincingly with both these points, and I do not think it necessary to go into further detail with regard to them.

The case of *In re St. Nicholas Cole Abbey* (1), in which a faculty such as is sought by this application was granted by Dr. Tristram, the then Chancellor of London, without reference to the Disused Burial Grounds Act and the prohibition against building in the third section, must be regarded as wrongly decided, so far as the construction of this Act is concerned. As there was no appearance in opposition in that case there was no one to bring to the mind of the Court the considerations necessary for its decision.

I do not propose to decide the further point which, having regard to the view taken by the learned Chancellor and by myself, does not arise—namely, whether, even if there were no statutory prohibition of building on this churchyard, the secularization of part of it by the proposed building could lawfully be sanctioned.

The case of *In re Bideford Parish* (2), a decision of my learned predecessor Sir Arthur Charles, which has not been considered so far as I am aware by the Judicial Committee of the Privy Council and which on that ground I should feel bound to follow, must be taken to have modified the effect of previous decisions so far as land taken from closed churchyards for roads in the vicinity of churches is concerned, but

(1) [1893] P. 58. (2) [1900] P. 314.

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it is perhaps worthy of consideration whether it is applicable to cases where questions of convenience of access to the church or churchyard are not involved.

The appeal must be dismissed with costs.

Solicitor for the Rector and Churchwardens: *Sidney Morse.*

Solicitors for the City of London Electric Lighting Company: *Phillips, Son & Rollinson.*

Solicitor for the London County Council: *T. Bullivant.*

A. L.

DIVORCE.

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Jan. 12, 18.

DEWE *v.* DEWE.

SNOWDON *v.* SNOWDON.

Husband and Wife—Common Law—Right to Maintenance—Deed of Separation—Agreement to live Apart with Allowance—Bankruptcy of Husband—Termination of Agreement—Dividend on Claim under Deed—Revival of Common Law Right—Wilful Neglect to maintain—Summary Jurisdiction (Separation and Maintenance) Acts, 1895 *to* 1925 (58 *&* 59 *Vict. c.* 39 *and* 15 *&* 16 *Geo.* 5, *c.* 51.

The bankruptcy of a husband who has entered into a separation deed is an answer to any claim for the payment of agreed sums under the deed, but does not convert his wife's agreement to live apart with an allowance into an agreement to live apart without maintenance. Her right to that maintenance is not in contract but is an incident of matrimonial status at common law. An agreement under a separation deed to receive an allowance merely suspends but does not annul that right, which revives as soon as the agreement is terminated by bankruptcy, notwithstanding the receipt of a dividend. The dividend is not a transaction between husband and wife but an incident in the bankruptcy, and its receipt does not operate as a new bargain with the husband compounding the common law right of the wife. The separation agreement thus put an end to does not debar the wife from alleging the wilful neglect of the husband to provide reasonable maintenance for her within the meaning of the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925.

THESE were appeals respectively from a metropolitan police magistrate and a court of summary jurisdiction sitting at Huddersfield in the county of York. The question arising

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on both appeals was whether a wife's right to put in operation the jurisdiction conferred by the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, in regard to a claim for maintenance was barred by her having entered into a deed of separation and proved in the subsequent bankruptcy of her husband as a creditor for past arrears and future instalments of an allowance under the deed.

In *Dewe* v. *Dewe* a metropolitan police magistrate refused an order and the wife appealed.

In *Snowdon* v. *Snowdon* the court of summary jurisdiction made an order and the husband appealed.

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In this case the deed of separation was entered into on December 9, 1919. It provided a weekly payment of 2*l.* 10*s.* On September 12, 1923, the husband was adjudicated a bankrupt. The wife's claim under the deed was admitted at 1380*l.* A dividend of 6*d.* in the pound was paid and the bankrupt obtained his discharge in 1924, subject to a consent to judgment for 50*l.* On October 10, 1927, the magistrate dismissed the wife's application for maintenance under the Summary Jurisdiction Acts, 1895 to 1925. The magistrate thus expressed his reasons for his decision: "To my mind it cannot be said that this man has wilfully neglected to provide reasonable maintenance for his wife, because they have separated under a properly drawn deed of separation approved by the wife's solicitor and providing her with 2*l.* 10*s.* per week for life. Unfortunately the man went bankrupt, and in his bankruptcy, rightly or wrongly she was advised to capitalize her claim—not to claim for the smaller amount of arrears then due—but to capitalize her claim for life to the extent of thirteen or fourteen hundred pounds. Unfortunately she only got 6*d.* in the pound. I cannot see how in face of this the wife can now turn round and say, 'You have wilfully neglected to maintain me.'"

The material ground of appeal was stated to be that the Court below was wrong in law in holding on the evidence that there had not been neglect to maintain.

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Fox-Andrews for the appellant. The only way in which the liability of the husband to maintain his wife can be discharged is by her being proved to be guilty of adultery: *Jones* v. *Newtown and Llanidloes Guardians*. (1) The magistrate's view was that the obligation would be discharged by the bankruptcy even if she had not proved, treating it as a debt provable under the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 30, sub-s. 3, and therefore discharged by the operation of s. 28, sub-s. 2, but the saving words, s. 30, sub-s. 1, apply to this case—namely, demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise. In *Victor* v. *Victor* (2), in which case it was decided that a wife could not sue for an annuity under a separation deed, after bankruptcy, although she had not proved for it, Cozens-Hardy M.R. said: "It seems to me that the whole policy of the Bankruptcy Act is that the bankrupt is to get complete discharge from contractual obligations to pay sums of money, and the only right of the person under the terms of the contract, whatever the pecuniary claim is, is to come in," and Fletcher Moulton L.J. said: "The mere fact that a man has become bankrupt does not free him from his obligation to support his wife."

The point of that case is that it shows that the wife's right to maintenance is not contractual.

In *McQuiban* v. *McQuiban* (3) Sir Samuel Evans P. treated a deed of separation with a covenant for maintenance as no bar to a petition for restitution of conjugal rights after the bankruptcy of the husband, succeeding the deed. It would conduce to fraud if a husband knowing bankruptcy to be imminent entered into a deed and then permitted himself to be adjudicated, thus ridding himself of all liability towards his wife. The law does not contemplate a bankrupt as having wholly performed his obligation to support his wife. In *Diggins* v. *Diggins* (4) it was held that a deed of separation did not debar a wife from resort to the summary jurisdiction

(1) [1920] 3 K. B. 381: per Shearman J. 385.

(2) [1912] 1 K. B. 247, 251, 252.

(3) [1913] P. 208.

(4) [1927] P. 88.

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court when the husband had not paid the allowance under the deed.

G. G. Honeyman for the respondent. I rely on the passage already quoted in the judgment of Cozens-Hardy M.R. in *Victor* v. *Victor*. (1) The appellant compounded her right at common law by entering into the deed. In *Ex parte Bates* (2) an annuity under a separation deed was valued and proved for, although, by reason of the death of the annuitant supervening, the trustees of the deed received more by way of dividend than the annuitant if living would have been entitled to, both parties, the creditor and the trustee in bankruptcy, taking the proof, as was said, for better or for worse.

As a creditor the appellant has received a dividend on the amount of her claim in full. *Jones* v. *Newtown and Llanidloes Guardians* (3) is distinguishable. That was a case between a public authority and a husband and different considerations applied. In *Ellis* v. *Ellis* (4) wilful neglect to maintain was held not to be a continuing offence. In this case the right accrued at the date of discharge and the appellant is out of time, her complaint having been made more than six months after the cause of it arose.

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In this case the deed of separation was entered into on December 8, 1922. It provided an allowance of 3*l.* per week On September 13, 1926, the husband was adjudicated a bankrupt on his own petition. The wife's claim was admitted for 844*l.* 5*s.*, on which on May 30, 1927, she received a first and final dividend of $8\frac{3}{8}d.$ in the pound. The husband had not received his discharge. On December 2, 1927, the court of summary jurisdiction made an order for 12*s.* 6*d.* per week.

The material ground of appeal was that the justices were wrong in law in making the order in that the wife's rights to maintenance were exhausted by her proving in the bankruptcy for, and receiving a dividend on, the capitalized value of the annuity under the deed.

(1) [1912] 1 K. B. 247.
(2) (1879) 11 Ch. D. 914.
(3) [1920] 3 K. B. 381.
(4) [1896] P. 251.

H. B. D. Grazebrook for the appellant. This case goes further than *Dewe* v. *Dewe* by reason of the non-discharge of the husband in his bankruptcy.

The wife contracted out of her common law right to maintenance by entering into the deed and must take the result of her proof in bankruptcy for better or worse. If she had not proved she might have been remitted to her common law right. As it is, the appellant could plead that the liability occurred before his discharge: Bankruptcy Act, 1914, s. 30, sub-s. 3. The unsatisfied debts in a first bankruptcy are now provable in a second: Bankruptcy Act, 1914, s. 39, sub-s. 1. The wife has altered her remedy by adopting the bankruptcy, which takes the husband out of the scope of the proceedings under the Summary Jurisdiction Acts.

Barnard for the respondent. I adopt the argument of the appellant in *Dewe* v. *Dewe*. The only question for the Court below was one of fact, whether the husband had been guilty of neglect to maintain. There is no abandonment of accrued rights by the deed; it only fixed an ascertained sum. The liability of the husband remained apart from his relations with his creditors. In *Linton* v. *Linton* (1) Brett M.R. said: "The power" (to order maintenance) "is given in consideration of the husband's ability to pay irrespectively of his having any realized property, and it is a power to make him pay out of his earnings by means of his own personal exertions." "A man's personal earnings after his bankruptcy do not go to his creditors; he keeps them himself notwithstanding his bankruptcy. That which would go to his wife would take nothing away from his creditors. If he does not pay it to her, he will keep it himself, and he will do this by means of a self-imposed bankruptcy."

Cur. adv. vult.

Jan. 18. THE PRESIDENT (LORD MERRIVALE) delivered a written judgment, in which after stating the substance of the appeal in *Dewe* v. *Dewe* he proceeded as follows: Before the learned magistrate the wife's rights appear to

(1) (1885) 15 Q. B. D. 239, 245.

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have been treated as purely contractual rights conferred by a deed which had been satisfied by operation of law. Before us it was more persuasively argued that the wife had accepted the provisions of the deed in satisfaction of all rights to maintenance, however arising, and that the husband's liability in respect of any such claim had been discharged by his bankruptcy or by the wife's acceptance of a dividend upon the capital value of the agreed amounts.

Reliance was placed on the husband's behalf upon numerous cases which established long since the right of a wife situated as the now appellant was to prove in bankruptcy the whole value of an agreement for payments by her husband in respect of maintenance, and upon cases which established that after bankruptcy the wife, so situate, has no cause of action under the agreement for maintenance. From a judgment of James L.J. in *Ex parte Bates* (1) these words were cited: "The statute has converted the annuity for the purpose of proof into a gross sum immediately payable, and on that sum the creditor is entitled to receive dividend; both parties, the creditor and the trustee, taking the proof for better or for worse." A judgment of Cozens-Hardy M.R. in *Victor* v. *Victor* (2) was cited for this statement: "It seems to me that the whole policy of the Bankruptcy Act is that the bankrupt is to get complete discharge from contractual obligations to pay sums of money, and the only right of the person under the terms of the contract, whatever the pecuniary claim is, is to come in." The various authorities relied upon do, of course, establish that bankruptcy is an answer to any claim, under a separation deed made before bankruptcy, for payment of agreed sums for maintenance. They do not, however, deal with the question of marital rights which is here involved and the amplitude of the language used in some of the cases may be misleading if it is considered without due regard to the subject-matter which was then under consideration.

The practical objection to the conclusion sought to be reached is that it would convert an agreement to live apart

(1) 11 Ch. D. 914, 916. (2) [1912] 1 K. B. 247, 251.

with an allowance for maintenance into an agreement to live apart without provision for maintenance.

Whether in the case of an agreement for maintenance between strangers the effect of bankruptcy would be what is suggested here would depend, no doubt, upon the tenor of the agreement as a whole. Here, however, it is necessary to have definitely in mind the position in law of the appellant as a married woman. Though the juristic capacity of married women has been broadly speaking equalized in recent years with that of other citizens the changes made have not eliminated some of their privileges. The course of events, mainly legislative, which has given to married women capacity to contract and to sue and be sued, has not abrogated certain elementary rules of law as to the consequences of marriage which affect disputes like the present but are apt to be forgotten. Behind the relevant statutory enactments is a historic development of law whereby contractual dealings with matrimonial rights have become cognizable by the Courts instead of being excluded as contrary to public policy. The judgment of Lord Brougham in the well known case of *Warrender* v. *Warrender* (1) in 1835 and the arguments and judgment in the more important case of *Wilson* v. *Wilson* (2) in 1848, give some information as to this matter. All the changes in question have left the married woman possessed of exceptional rights which are relevant to the matters now under consideration.

It is necessary, then, to see what is the nature in point of law of a wife's right to maintenance by her husband and to what extent the right is necessarily affected by a separation deed containing an agreement to pay moneys for maintenance. The right of a wife to maintenance as against her husband is not contractual in its nature. It is an incident under the common law of the status or estate of matrimony, which is thus summarily expressed in Bacon's Abridgment (3): "A husband is obliged to maintain his wife, and may by law be compelled to find her necessaries, as meat, drink,

(1) (1835) 2 Cl. & F. 488, 527.
(2) (1843) 1 H. L. C. 538.
(3) 7th ed., vol. i., tit. "Baron and Feme," p. 713.

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clothes, physic, etc., suitable to the husband's degree, estate, or circumstances." Among the authorities cited in support of this proposition is the famous case seven times argued of *Manby* v. *Scott* (1), wherein as to one resolution all the judges agreed: "Fuit resolve per touts les Justices d'Angleterre que barons doint maintaine lour femes ove necessaries."

One of the most familiar illustrations of the wife's right of maintenance is her power to pledge her husband's credit for necessaries, and very often in actions of debt for necessaries supplied to married women living apart from their husbands under agreement for maintenance the liability of the husband had been found to depend upon an inquiry whether the husband has paid as agreed. In *Ozard* v. *Durnford* (2) Lord Mansfield stated the rule as to exemptions from liability for necessaries to the wife in this concise phrase: "If, upon separation, the husband agrees to make her a sufficient allowance and pays it . . . . the husband is not liable." The language is the more striking for its brevity—"agrees" and "pays."

Besides the prima facie authority of the wife to pledge the husband's credit another expression of the obligation which is inherent in the marriage tie is the liability of the husband to reimburse costs of maintenance of his wife which may fall on any poor law authority. This is statutory and intact.

How and to what extent a wife can relieve her husband of liability for her maintenance is not necessary for consideration here. The effect of a separation agreement in common form with common form clauses as to maintenance is alone in question. An agreement for these provisions suspends the common law right of the wife, but does not annul it. Without some express provision to the contrary the right would become operative in its entirety upon a return of the parties to cohabitation.

As from the bankruptcy of the husband in this case there

(1) (1663) 1 Siderfin, 109, 120.

(2) 1 Selwyn's Nisi Prius, 13th ed., p. 229; and see *Norton* v. *Fazan*, (1798) 1 Bos. & P. 226; *Johnston* v. *Sumner* (1858) 3 H. & N. 261, 268 and *Beale* v. *Arabin* (1877) 36 L. T. 249.

ceased to be in existence any agreement of his providing for the discharge of his common law obligation or capable of being set up in answer to the wife's claim thereunder. The equitable right of the husband to set up the agreement made in limitation of the primary right is gone. How far, and for what purposes the separation agreement subsists, if at all, depends upon circumstances not necessary for examination in this case.

That there is no combined effect of a separation deed with provisions for maintenance and the subsequent occurrence of bankruptcy which deprives a wife of her claims against her husband to be provided for as a wife is declared in a considered judgment of Sir Samuel Evans P. delivered in 1913 in the case of *McQuiban* v. *McQuiban*. (1) The facts bore some likeness to the facts in this case. The deed contained an agreement for maintenance and a covenant against any suit for restitution of conjugal rights, but the learned President declared that the foundation of such a deed is the obligation to maintain, and, in view of the decisions which preclude an action on the deed after bankruptcy, held that the husband's refusal of cohabitation and of maintenance founded a right in the wife to a decree of restitution—a decree which in case of disobedience might be made the ground of a decree of judicial separation with due provision for maintenance.

Besides raising the defence founded on the bankruptcy the husband relies on the wife's action in making proof of a claim under the agreement and receiving a dividend from the estate. The receipt of a dividend is said to operate by way of composition, novation, or satisfaction under a substitutional agreement. It is to be observed, however, that the claim and receipt of dividend were not incidents in a transaction between husband and wife. The husband's estate came to be distributed according to law and the wife having an agreement for certain payments of money which gave right of proof proved upon it without any new bargain with the husband. Whether she proved or not the husband's

(1) [1913] P. 208.

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liability under that agreement went upon bankruptcy. If there is the appearance of inconsistency it arises from the statutory provisions governing bankruptcy.

The argument comes back to the position that the common law right of wife against husband, which had been suspended during the existence of the agreement for periodical payments, revived as soon as that agreement was gone and it revived notwithstanding the receipt of dividends payable by reason of the agreement.

The wife in this case is not, then, disabled in point of law, by the separation agreement and the husband's bankruptcy from alleging that her husband is "guilty of wilful neglect to provide reasonable maintenance for her" within the terms of the statutes under which her summons was issued. The husband is not relieved by the facts on which he has relied from his common law liability; and he does not provide maintenance for his wife. It is proper, therefore, that the case should go back to the learned magistrate in order that he may determine the extent of the contribution the husband should be ordered to make having regard to the wife's position, the husband's resources and the provisions of the statutes.

BATESON J. I agree entirely with the judgment that my Lord has delivered.

Appeal allowed with costs.

SNOWDON *v.* SNOWDON.

THE PRESIDENT (LORD MERRIVALE). In this case the judgment which I have delivered in the previous appeal applies. The result is that this appeal is dismissed.

BATESON J. I agree.

Appeal dismissed with costs.

Solicitors in *Dewe* v. *Dewe:* for appellant, *Lawrence Jones & Co.;* for respondent, *H. W. Clarkson, for Herbert Simpson, Son & Bennett, Leicester.*

Solicitors in *Snowdon* v. *Snowdon:* for appellant, *Upton, Britton & Lumb, for Wilmshurst & Kaye, Huddersfield;* for respondent, *Firth & Co., for Cartwright & Fieldhouse, Huddersfield.*

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DIVORCE.

1928
Jan. 30;
Feb. 6.

M. *v.* M.

Husband and Wife—Judicial Separation—Alimony pendente lite—Time for obtaining Order—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *ss.* 16, 22—*Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *ss.* 32, 103, 185—*Divorce Rules* 57, 58, 59, 61, 64.

The power of the Court originally derived from the Ecclesiastical Courts through the Matrimonial Causes Act, 1857, to order alimony pendente lite in a suit for judicial separation is now continued in a consolidated form by the Judicature (Consolidation) Act, 1925, and remains substantially that of the Ecclesiastical Courts. By the practice of these Courts the provision of alimony pendente lite was a privilege of the wife for her subsistence during the litigation; but permanent alimony was then, as now, ordered as from the date of the decree, upon the granting of which the necessity for the privilege ceased. Accordingly a wife who has obtained a decree of judicial separation is not entitled to an allotment of alimony pendente lite unless she has obtained an order for it before the decree, although she may have commenced proceedings earlier in the suit to obtain it.

Ver Mehr v. *Ver Mehr* [1921] P. 404 (a case of restitution of conjugal rights) distinguished.

ADJOURNED SUMMONS.

The wife filed her petition dated March 26, 1927, for judicial separation, alleging the adultery of the husband. The husband traversed the charge and on November 2, 1927, the case was heard and a decree of judicial separation was pronounced with costs, giving the wife the custody of the only child of the marriage. Early in the proceedings the wife had filed her petition for alimony pendente lite, but this latter petition did not come on to be heard by a registrar till January 11, 1928, more than two months after the termination of the lis. The registrar made no order on the petition except that the husband should pay the wife's costs of it up to the date of the decree. The wife appealed to a judge in chambers, who adjourned the summons into Court for argument.

1928. Jan. 30. *T. Bucknill* for the appellant. It is suggested in Rayden on Divorce, 2nd ed., p. 188, that after decree it is too late to obtain an award of alimony pendente

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lite, but a wife who is a litigant has a right to apply for alimony, Divorce Rule 57; the provisions in the Rules for proceeding with the inquiry on the petition are mandatory. These rules were made under the authority of the Matrimonial Causes Acts and have the force of law. Proceedings for judicial separation are now governed by the Judicature Consolidation Act, 1925, s. 185, and the enactment that a decree of judicial separation shall have the same force and effect as a divorce a mensa et thoro in the Ecclesiastical Court involves a right, as the marriage still subsists, to have alimony assessed. In *Ver Mehr* v. *Ver Mehr* (1), a suit for restitution of conjugal rights, the wife's right to alimony pendente lite was held to be unaffected by the fact that the order was not made till after decree.

H. B. D. Grazebrook for the husband. In *Brisco* v. *Brisco* (2) it was said by Sir William Scott: "It is always desirable that an allegation of this nature (of the husband's means) should be given at an early period; and that the question of alimony should be disposed of, in the first stage of the proceedings, to prevent the husband being unnecessarily harassed, with suits and demands for his wife's debts."

Though there is no precise precedent, this shows that the question of alimony should be disposed of at all events during the pendency of the suit. There is no longer a suit pending.

Bucknill in reply. Permanent alimony commences from the date of the decree: Divorce Rules 64. This shows the intention that the period of the suit should be covered by alimony pendente lite.

Cur. adv. vult.

Feb. 6. THE PRESIDENT (LORD MERRIVALE). The applicant was petitioner and her husband respondent in a suit for judicial separation instituted in March, 1927. With due diligence after her petition was filed she sought an order for alimony pendente lite—apparently upon sufficient grounds, but there was delay in the interlocutory proceedings, not due to any default in her solicitor, and the suit came to trial in November,

(1) [1921] P. 404. (2) (1816) 2 Hagg. Cons. 199.

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1927, and a decree for judicial separation was made before the interlocutory application had been brought to a hearing. Ten weeks later it was brought on and the learned registrar made no order save that the respondent should pay the wife's costs of the application up to the date of the decree. The wife appeals and asks that directions shall be given for an inquiry with a view to such order as the facts may warrant for payment of alimony pendente lite. In support of the appeal reliance is placed upon the general terms in which the Matrimonial Causes Rules, 1924, rr. 57, 58, 59 and 61, direct proceedings in respect of alimony pending suit; it is contended that the suit was not at an end on January 11, 1928, inasmuch as the marriage still subsisted and the decree was subject by statute to be reviewed or rescinded in certain events, and it is argued that this case is governed by a decided case of *Ver Mehr* v. *Ver Mehr*. (1) Further there is a suggestion that the right of the wife to maintenance, which is in question, is a substantive right asserted by this petition for alimony and proper to be enforced irrespective of the position of this suit. The case for the husband is that after the pronouncing of a decree which is the final judgment of the Court in the suit, there is no longer any lis pendens and therefore no such order as is sought can be made.

The case of *Ver Mehr* v. *Ver Mehr* (1) does not govern this discussion. The suit there was the wife's suit for restitution of conjugal rights; the order for restitution had not been obeyed and although no steps had been taken under the Matrimonial Causes Act, 1884, the husband was guilty of desertion and of disobedience of a subsisting order. As was pointed out, the decree had the effect of a like decree in the Ecclesiastical Courts—save in so far as the statute of 1884 otherwise provides. What was said in that case was that inasmuch as in the Ecclesiastical Courts the husband cited in such a suit remained subject to the jurisdiction of the Court until there had been obedience to the decree or the decree was discharged, the husband was liable for maintenance. Practice of long standing was thus confirmed.

(1) [1921] P. 404.

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The rules of practice which are in question must manifestly be construed with due regard to the subject-matter of the law relating thereto. The powers of the Court were conferred by the Matrimonial Causes Act, 1857, s. 22, now consolidated in the Judicature Act, 1925, ss. 32 and 103, and are in substance these: "In all suits and proceedings, other than proceedings to dissolve any marriage, the Court shall proceed and act and give relief on principles and rules which in the opinion of the Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief."

Under the practice of the Ecclesiastical Courts, as now, two distinct powers existed in respect of enforcement of the husband's duty to maintain his wife. Pending suit for judicial separation the coercive authority of the tribunal was available to secure to the wife means of subsistence and necessary money for costs while the parties were proceeding with the litigation. When the questions between them had been determined by decree, the wife, if she were the successful party, might obtain on a new petition a decree to ensure her permanent maintenance according to her husband's means.

The interlocutory processes for alimony and costs were coercive means of securing—if need be—by monition and excommunication that the wife should be heard in the cause. How purely transitory they were, appears upon even a slight examination of the text-books and the authorities. The older writers describe the payments for maintenance as hebdomadal. In the case of appeal new provision was obtainable in the Court of Arches. The current expression which described the means of securing money for costs was —taxation from day to day. In *Westmeath* v. *Westmeath* (1) the answer made to an attempt to secure a taxation after decree was that the costs were unpaid because of neglect to procure taxation de die in diem while the suit was in progress.

The position of the wife pending a suit for judicial separation remained, in principle, very much the same after

(1) 2 Hagg. Ecc. Supp. 1, at p. 133.

1857 as it was before; but her rights, if she were successful in obtaining a decree, were strengthened by definite provisions of the Matrimonial Causes Act, 1857, which gave her during separation rights as a feme sole; as well as by statutory recognition of the practice under which she became entitled to a permanent provision for her maintenance.

Under the practice of the Ecclesiastical Courts and ever since permanent alimony upon judicial separation is ordered to be paid as from the date of the decree. To accept the suggestion that the suit for judicial separation is a suit still pending after the decree would involve the absurd consequence that alimony pendente lite and permanent alimony might be accruing at the same time and indeed petitions in respect of both might proceed simultaneously.

The practice of this Court as illustrated by the orders made in the registry rests upon the fact that the process resorted to before decree is a privileged procedure limited by the necessities of the case and not the exercise of a substantive right such as gives a cause of action.

The necessity which can be so dealt with ceases when the decree is granted. To give a direction now for inquiry as to the wife's maintenance during the period from March to November, 1927, while the litigation was proceeding, would be a new departure, and in view of the hardships which often arise where a husband is petitioner it would involve mischievous consequences. The application, therefore, is refused.

Solicitors for respondent: *Jaques & Co., for Porter & Co., Conway.*

Solicitors for petitioner: *Sharpe, Pritchard & Co., for Amphlett & Co., Colwyn Bay.*

R. M. M.

1928
Jan. 27;
Feb. 14.

PROBATE.

In the Goods of GATES.

Will—Construction—Bequest of "all my money"—Partial Intestacy—Right to Grant of Administration—Non-contentious Probate Rules, r. 119.

A testator made his will in these terms: "I leave all my money to A. B." There was no appointment of an executor. A. B. moved for administration with the will annexed. The estate consisted of cash in the house and at the bank, a mortgage debt, stocks and shares, furniture and an equity of the redemption of freehold property. The parties interested in intestacy resisted the application:—

Held, that in the absence of any context, the will disposed of the whole estate except the equity of redemption and the furniture, but that the application failed, the persons entitled in intestacy taking the grant in priority to a legatee or devisee under Non-contentious Rule 119 operating since January 1, 1926, in the case of an estate not wholly disposed of.

MOTION for grant of administration with a will annexed.

The testator, Alfred Gates, who died on April 21, 1927, duly executed a will dated March 21, 1927, in the following words: "I leave all my money to Alfred George Cabell." Alfred George Cabell moved for a grant to him of administration with the will annexed in the character of universal legatee and devisee thereunder.

The parties interested in an intestacy of the deceased opposed the motion.

Owen Thompson K.C. (*C. Mortimer* with him) for the applicant stated the case (the facts of which so far as are material appear in the judgment).

Spens K.C. (*G. C. Tyndale* with him) for the parties interested in intestacy. The question to be decided is succinctly referred to in Hawkins on Wills, 3rd ed., p. 61. "The word 'money' is not unfrequently used by uneducated persons at all events, to denote the whole of a man's personal property; but such is not its legal meaning." The authorities on the meaning of the word "money" commence with *Lowe* v. *Thomas*. (1) There are two classes of cases: (*a*) "the whole of my money," as in the *Lowe* v. *Thomas* class of case,

(1) (1854) 5 D. M. & G. 315.

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GATES, *In the Goods of.*

and (*b*) those dealt with in Hawkins on Wills, which depend on the construction of the context with reference to which the word "money" is used. So in *Rogers* v. *Thomas* (1) it was held by Lord Langdale that a bequest of "all which may remain of my money after my lawful debts and legacies are paid," passed the residue of the general personal estate. In *Langdale* v. *Whitfeld* (2) "all the residue of my monies" was held to comprise not only money in hand but also all money due to the testator, but in *Larner* v. *Larner* (3) "all sums of money I may die possessed of" was construed as money in the strict sense.

The Court looks at the question what property the testator had at the date of the will and at that of his death. "Money" has a legal meaning, and though that meaning is capable of extension by the context, all that passes by the words of this will is money in the house and at the bank.

Owen Thompson K.C. "Money" here means at least the whole personal estate. As to real estate under the old law only express words could disinherit the heir at law, and up to the passing of the Administration of Estates Act, 1925, it could not have been argued that more than the personal estate passed in this case, but since that statute the question is an open one whether "money" does not pass the whole estate, because there being no longer an heir at law the distribution of all property is equal amongst those entitled in the same degree. The maxim "Cessante ratione legis cessat ipsa lex" applies. The very fact that there is no context in itself constitutes a context. *Prichard* v. *Prichard* (4) is exactly in point as to the personal estate. The judgment of Kay J. in *In re Cadogan* (5) shows that in 1883 the Court was already revolting from the doctrine of *Lowe* v. *Thomas*. (6) In *In the Goods of Bramley* (7) the words, "the rest of my money," after the gift of a specific legacy were held to cover the residue of the estate. *In re Gliddon* (8) is distinguishable.

(1) (1837) 2 Keen, 8.
(2) (1858) 4 K. & J. 426.
(3) (1857) 3 Drew. 704.
(4) (1870) L. R. 11 Eq. 232.
(5) (1883) 25 Ch. D. 154.
(6) (1854) 5 D. M. & G. 315.
(7) [1902] P. 106.
(8) [1917] 1 Ch. 174.

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In that case the gift of "all my monies" was followed by a specific bequest.

[LORD MERRIVALE P. In that case the testatrix had provided a vocabulary.]

In *In re Woolley* (1) "monies" was held to include investments. In *In re Taylor* (2) "money I have and am entitled to now and at any future time," was held by the Court of Appeal to include securities and investments.

[He also referred to *In re Skillen.* (3)]

There is now no rendering of the term money short of all the estate unless limited by the context as in *In re Taylor.* (2)

The deceased is to be credited with knowledge of what property he had, and that this concise document had been written out for him.

Spens K.C. in reply. The onus is on the applicant as actor in the proceedings to show that there is a context, and he cannot do so.

In *In re Buller* (4) Stirling J. doubted *In re Cadogan.* (5) In *In re Skillen* (3) the question was how to read the document.

Cur. adv. vult.

Feb. 14. THE PRESIDENT (LORD MERRIVALE). Alfred George Cabell moves in the estate of Alfred Gates deceased for letters of administration with the will annexed.

The testator died on April 21, 1927, leaving him surviving a brother, a sister and ten children of deceased brothers. A will duly executed by him on March 21, 1927, was in force at his death, and consisted, so far as the operative part is concerned, of these words only: "I leave all my money to Alfred George Cabell." The testator's estate at his death comprised 4*l.* in money in the house; a sum of 1599*l.* 1*s.* 7*d.* stood at his credit on current account at his bankers; 800*l.* was outstanding on mortgage with some arrears of interest; there was 500*l.* nominal amount of 5 per cent. War Loan,

(1) [1918] 1 Ch. 33.
(2) [1923] 1 Ch. 99.
(3) [1916] 1 Ch. 518.
(4) (1896) 74 L. T. 406.
(5) 25 Ch. D. 154.

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some stock and shares in joint stock companies of the value at par of 1280*l.* with dividends accruing, furniture of the estimated value of 200*l.*, the equity of redemption of three freehold cottages valued as freeholds at 600*l.*, and by the combined operation of a marriage settlement and a bequest under the will of his deceased wife the right to receive the sum of 450*l.* secured on the cottages by mortgage.

From the time of a serious accident two and a half years before the testator's death, and in particular during a long illness, upon which his death ensued, the applicant appears to have rendered continuous service to the testator and to have earned his gratitude. During the illness none of the relatives of the deceased is said to have been in touch with him.

The will in question was written at the testator's request by an inmate of his house at a period during his last illness, when, as it seems, he thought that he was about to die. The writer supplied the words used, and they were not discussed by the testator. The material words of the instructions he gave are a statement in these words : " I want Cabell to have all my money," and a further statement, after some discussion of a suggestion that he should make bequests to members of his family, " No, I want Cabell to have it all."

In the argument before me no weight, probably rightly, was attached to these verbal statements.

It was common ground that the will must be construed according to the true meaning of the words used therein, having proper regard to the situation of the deceased and the nature of his assets.

The motion of the applicant is resisted on behalf of the next of kin on the grounds of necessary strictness in the construction of testamentary instruments which were applied in the decision of the Court of Appeal in Chancery in *Lowe* v. *Thomas*. (1) They are embodied in a text from the Digest (2) in the judgment of Knight Bruce L.J. and in these words of

(1) 5 D. M. & G. 315.

(2) "Non aliter a significatione verborum recedi oportet quam cum manifestum est aliud sensisse testatorem." D. 32. 1, 69.

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like effect in the judgment of Turner L.J. : "It is necessary to adhere to the proper and correct sense of the words used in the will, where there is no context to give a different effect to them."

By way of illustration of the application of the rule counsel referred to numerous authorities covering a long period of time and a great variety of wills, and more particularly judgments such as that of Lord Selborne in *Byrom* v. *Brandreth* (1); that of Kay J. in *In re Cadogan* (2); that of Stirling J. in *In re Buller* (3); that of Jeune P. in *In the Estate of Bramley* (4); that of Sargant J. in *In re Skillen* (5); that of Younger J. in *In re Gleddon* (6); that of Eve J. in *In re Woolley* (7); and the judgments of the Court of Appeal in *In re Taylor*. (8)

In each of the cases cited before me the Court in which the true construction of the language used by the various testators was to be determined came to its conclusion as to the meaning of the words used in the instrument before it with some assistance from the context of the will. Here the sentence presented for construction has no context. The problem to be solved, however, is the same: What is the meaning of the words used by the testator? An elementary consideration which is strongly emphasized by comparison of the older judgments with some of those more recent in date is that the meanings of words become modified from time to time in course of use. Another is that a word or words capable of or used to express one meaning with regard to one subject-matter or one set of circumstances may have a different meaning when applied to a different matter or under other circumstances.

My predecessor Jeune P. followed in *In the Estate of Bramley* (4) the opinion of Kay J. in *In re Cadogan* (2) "that there should be no absolute technical meaning given to such a word as 'money' in a will, but that its meaning

(1) (1873) L. R. 16 Eq. 475.
(2) 25 Ch. D. 154.
(3) 74 L. T. 406.
(4) [1902] P. 106, 107.
(5) [1916] 1 Ch. 518.
(6) [1917] 1 Ch. 174.
(7) [1918] 1 Ch. 33.
(8) [1923] 1 Ch. 99.

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in every case must depend upon the context if there is any, and upon those surrounding circumstances which the Court is bound to take into consideration in determining the construction."

It was not suggested on behalf of the next of kin in the argument before me that the testator's will operated only upon the small sum in notes or specie found among the testator's effects at his death. Counsel conceded that the balance on current account at the bank must be held to pass. The correct and proper sense of the word "money" (*Lowe* v. *Thomas* (1)) in this will would extend if that be so to choses in action. If "money" in this will may include a debt due on demand from a banker, may it not include a debt accruing due at a fixed date from the State or a sum outstanding on a mortgage? May the word "all" extend it, as it was so extended in some of the cases, so that the testator's bequest of all his money operated to include investments in stocks and shares? As every one knows men often speak of "their money" when they describe all their assets or resources.

I was reminded during the argument of the recent legislation which has enlarged the effect of the appointment of a legal personal representative so as to vest in the legal personal representative of a deceased person real estate which was vested in him "for an interest not ceasing on his death," and of the familiar presumption that "when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce—that he did not intend to die intestate," as was said by Lord Esher M.R. in *In re Harrison. Turner* v. *Hellard* (2), and of another presumption arising out of the old law of wills, that, without clear words, a will is not to be construed to disinherit the heir at law. The modern enactments in relation to the devolution of real property on the death of an owner, however, seem to me to have little bearing on the immediate question of the construction of this will. Nor do the several presumptions give any effective help.

(1) 5 D. M. & G. 315.

(2) (1885) 30 Ch. D. 390, 393.

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GATES, *In the Goods of.* — The President.

Assuming the testator to have intended to die testate and to leave nothing undisposed of, I am left to determine what he has done by the words in which his will is expressed. I cannot find in them and the other relevant circumstances any indication that the testator used the word "money" to include either furniture or real estate. A gift of "all" would have passed them both. But the comprehensiveness of that term is, it seems to me, necessarily limited by the subject-matter, the testator's "money." The furniture and the cottages may well have been unthought of by the testator, and at any rate they are not designated by the language employed by his amanuensis. The conclusion at which I have arrived is that the will disposes of all the testator's estate except the equity of redemption of the cottages and the furniture.

When I mentioned as possible the view of the will which I have expressed, counsel for the applicant pressed upon me that if this view should be taken he would be entitled as matters stand to a grant of administration with the will annexed. Under r. 119 of the Rules in respect of Non-contentious business which are now in force, where a deceased person has died since January 1, 1926, leaving a will whereby the estate is not wholly disposed of, the persons entitled under an intestacy take a grant of administration with the will annexed in priority to legatees or devisees. The estate is not wholly disposed of by the will, and the applicant would not be entitled under an intestacy.

The motion therefore fails, and there will be a grant as in intestacy, and the costs of both parties as between solicitor and client will be paid out of the general estate rateably.

Solicitors: *Bartlett & Gregory, for Bartlett & Sons, Sherborne; Reynolds, Sons & Gorst.*

R. M. M.

ADMIRALTY.

1928
March 5.

THE POINT BREEZE.

Shipping—Collision—Action in rem—Bail—Arrest after Judgment to enforce additional Bail—Motion to set aside Warrant of Arrest.

In a damage action in rem the plaintiffs demanded and obtained bail from the defendants in the sum of 3500*l.* After judgment had been given pronouncing the defendant's ship alone to blame, the plaintiffs demanded further bail in the sum of 3000*l.*, on the ground that the original sum demanded was insufficient to cover their damages. On the refusal of the defendants' solicitors to give an undertaking to provide additional bail, the plaintiffs extracted a warrant of arrest from the Admiralty registry under which the defendants' ship was arrested. On a motion to set aside the warrant of arrest:—

Held (following the opinion of Dr. Lushington in *The Kalamazoo* (1851) 15 Jur. 885 and *The Wild Ranger* (1863) Br. & Lush. 84, that the effect of taking bail is to release the ship altogether), that the warrant of arrest must be set aside.

Motion by the defendants, the owners of the steamship *Point Breeze*, to set aside a warrant of arrest in an action of damage by collision.

On November 26, 1927, a collision took place between the plaintiffs' steamship *Flamand* and the *Point Breeze*, a motor ship owned by an American company, the United Petroleum Company, Inc. After the collision the *Flamand* proceeded on her voyage, but ran aground on a shoal when approaching Dunkirk and had to take tug assistance to get into port. On December 6 the plaintiffs issued a writ in rem against the *Point Breeze*, and the defendants' solicitors accepted service and gave the usual undertaking to put in bail. On December 19 the defendants gave a bail bond in the sum of 3500*l.*, the amount of security demanded by the plaintiffs. On December 21 Bateson J., sitting with Trinity Masters, pronounced the *Point Breeze* alone to blame and referred the assessment of the damages to the registrar and merchants. On December 28 the plaintiffs' solicitors were informed by their clients that the amount of bail originally demanded would be insufficient to cover the damages caused by the collision, and, as the defendants' solicitors had no instructions

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to give an undertaking to put in further bail in the sum of 3000*l.*, the plaintiffs' solicitors extracted a warrant of arrest from the Admiralty registry, and the *Point Breeze* was arrested at Southampton shortly before she was due to sail. On December 29, to enable the vessel to sail, the defendants gave an undertaking, under protest, to provide the additional bail.

It appeared that by the collision the *Flamand* had sustained damage to her bows, and the original demand for 3500*l.* was based on the survey of that damage. After being dry-docked, however, the plaintiffs alleged that damage to the engines due to the stranding was revealed, and the demand for further bail was to cover the plaintiffs in respect of that damage. At the trial, when the question of liability was determined, the issue that the grounding and consequent damage were the result of the collision was not before the Court. On February 13, 1928, the defendants set down the present motion.

C. R. Dunlop K.C. and *R. F. Hayward* for the defendants in support of the motion. The maritime lien is extinguished by giving bail, and when bail has been given by the defendants in the amount demanded by the plaintiffs the ship cannot be arrested in the same action to obtain additional bail—at any rate without an order of the Court: see the observations of Dr. Lushington in *The Kalamazoo* (1) and *The Wild Ranger*. (2) It is true that in the later cases of *The Hero* (3) and *The Flora* (4) Dr. Lushington gave leave to rearrest; but in the former case there had been a mistake in the amount for which the action had been instituted, and in the latter the Court imposed terms and cancelled the bail bond already given. Also, in both cases the rearrest was before judgment. Similarly in *The Miriam* (5) and *The Freir* (6) orders were made by the Admiralty Court for rearrest pending appeals from the county court. Also, what may be called "rearrest"

(1) 15 Jur. 885.
(2) Br. & Lush. 84.
(3) (1865) Br. & Lush. 447.
(4) (1866) L. R. 1 A. & E. 45.
(5) (1874) 2 Asp. M. L. C. 259.
(6) (1875) 2 Asp. M. L. C. 589.

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in respect of costs is sometimes allowed, but this is really the Court's mode of execution for costs : see *The Freedom.* (1)

The older cases must be read in the light of the judgment in *The Dictator* (2) and *The Gemma* (3), which made clear what really is the nature of an action in rem. The observations of Jeune P. in the former case strongly support the defendants' contention. The plaintiffs will be entitled to enforce their judgment against the defendant personally when the registrar has assessed the damages, but they cannot anticipate their rights. At the highest they might have invoked the equitable jurisdiction of the Court ; they did not do that, but took matters into their own hands and extracted a warrant of arrest, to which they were not entitled.

[Reference was also made to *The Zephyr* (4) ; *The Johannes* (5) ; and *The Johannis Vatis.* (6)]

A. T. Bucknill for the plaintiffs. If the ship has been released on bail in her full value it is conceded that she cannot afterwards be arrested, because the maritime lien has gone ; also, if the parties for good consideration have definitely agreed to bail for less than the value of the res, the plaintiffs might be restrained from breaking faith. But in every other case the plaintiffs' right of arrest remains.

[BATESON J. Is your argument that plaintiffs can go on arresting day after day to enforce bail in increasing amounts until the full value of the res is reached ?]

Yes. Subject to the possibility of being penalized in costs and to the liability of being condemned in the bail fees if excessive bail is demanded, the plaintiffs are entitled to bail up to the full value of the defendants' ship. There was no consideration for purchasing the immunity of their ship from arrest in any less sum than her full value, and the defendants, therefore, have not been prejudiced. Possibly the leave of the Court may be necessary where the ship has been arrested and released, because the Court has laid its hand upon the ship and has let her go. In the present case

(1) (1871) L. R. 3 A. & E. 495.
(2) [1892] P. 304, 318, 321.
(3) [1899] P. 285.
(4) (1864) 11 L. T. 351.
(5) (1870) L. R. 3 A. & E. 127.
(6) [1922] P. 213.

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the *Point Breeze* was never arrested, and the fact that no application for leave to arrest was made cannot affect the matter; either the plaintiffs had the right to arrest or they had not, and if they had no right the Court could not confer a right. In *The Kalamazoo* (1) the argument against the second arrest was confined to the plea of res judicata, the plaintiffs having instituted a fresh action. *The Hero* (2) is directly in the plaintiffs' favour. When his decision in *The Kalamazoo* (1) was cited to him Dr. Lushington said that case was decided on the question of res judicata, and he gave leave to rearrest the ship.

[BATESON J. Dr. Lushington did not mean "res judicata" in the ordinary sense of that phrase.]

Parts of the judgments in *The Kalamazoo* (1) and *The Wild Ranger* (3) are no longer good law since the decision in *The Dictator.* (4) *The Flora* (5) also strongly supports the plaintiffs' contention; but if the defendants are right and the maritime lien has gone when bail has been given, that case was wrongly decided, and so were the cases in which rearrest has been allowed for costs: *The Freedom* (6); *The Falk* (7); *The Lorena.* (8) The plaintiffs have not allocated the bail, and if insufficient, on the authority of those cases, they would have the right to arrest for costs. There is no invariable rule on the question of rearrest: see per Jeune J. in *The Dictator* (9), and no clear authority against the right where bail has been given in less than the full value of the res. There was no time or opportunity to apply to the vacation judge on December 28, and if the Court thinks that leave is necessary, the plaintiffs should be given that leave now.

Dunlop K.C. in reply. Under Order XXIX., r. 3, the defendant could have obtained the release of the ship by paying into Court the amount in which the action had been commenced, and have a right under the rules to compel

(1) 15 Jur. 885.
(2) Br. & Lush. 447.
(3) Br. & Lush. 84.
(4) [1892] P. 304.
(5) L. R. 1 A. & E. 45.
(6) (1871) L. R. 3 A. & E. 495.
(7) (1882) 4 Asp. M. L. C. 592.
(8) Unreported. 1906, fol. 21.
(9) [1892] P. 304, 321.

the plaintiffs to state the amount of their claim. If the maritime lien is not extinguished and shipowners who have given bail can only sell subject to the risk of the ship being arrested again their position is a serious one.

BATESON J. I think this motion must succeed. The collision happened on November 26, 1927, between the *Flamand*, a French ship, and the *Point Breeze*, an American ship. I held the *Point Breeze* alone to blame. Bail was asked for on November 28 in 3500*l*. On December 2 the vessel was surveyed in Dunkirk for damage, and all the damage that was found was damage to her stem. On December 6 a writ was issued against the *Point Breeze*. The defendants' solicitors accepted service and gave the usual undertaking to put in bail. On December 19 the bail bond was completed in the sum of 3500*l*. as demanded by the plaintiffs. On December 21 judgment was given, and on December 28—that is, seven days after the judgment—the plaintiffs asked for additional bail in the sum of 3000*l*., and they arrested the *Point Breeze* at Southampton for that amount in this action. On December 29 the defendants' solicitors gave an undertaking to give the additional bail, but they gave it under protest. Now they move before me to set aside that arrest.

The case seems to be covered by the clear expression of opinion of Dr. Lushington in *The Kalamazoo* (1): "It is perfectly competent to take bail to the full value, but the effect of taking bail is to release the ship in that action altogether. It would be perfectly absurd to contend that you could arrest a ship, take bail to any amount, and afterwards arrest her again for the same cause of action. The bail represents the ship, and when a ship is once released upon bail she is altogether released from that action." True, he goes on to say that there is no way of making the defendants pay—that is, putting it in quite general language—except through the bail or the res. That part of the judgment has since been overruled by *The Dictator* (2); *The Gemma* (3);

(1) 15 Jur. 885, 886. (2) [1892] P. 304.
(3) [1899] P. 285.

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and other cases, in which it is made plain that anybody getting judgment in an action in rem is entitled to issue execution for any balance against the parties who have appeared to defend in that action. But the earlier part of the judgment that I have read does not seem to me to have been qualified except possibly by Dr. Lushington himself, a question with which I will deal later.

In *The Wild Ranger* (1) Dr. Lushington repeats his opinion : " Now bail given for a ship in any action is a substitute for the ship ; and whenever bail is given, the ship is wholly released from the cause of action, and cannot be arrested again for that cause of action." In *The Wild Ranger* (1) the facts were that the owners of the ship and the owners of the cargo each arrested the ship. The shipowners obtained bail for some 92*l.* less than their claim turned out to be. The cargo owners had the ship sold, and their claim was satisfied out of the proceeds, leaving a balance in Court. The shipowners then sought to get the balance out of the proceeds in Court, and their application was refused. That, of course, nowadays would not be so, but the statement of Dr. Lushington that I have read is a repetition of what he said in *The Kalamazoo* (2), and, as far as I know, has not been directly overruled. That was in 1863.

It is true that in 1865 and 1866 Dr. Lushington decided two cases, *The Hero* (3) and *The Flora* (4), which seem to throw some doubt on this general statement to which I have referred. In *The Hero* (3) Dr. Lushington says : " In *The Kalamazoo* (2) and *The Wild Ranger* (5) are expressions which, literally interpreted, would indicate that I have no power to grant a re-arrest for the same cause of action after the property has been released on bail ; but those expressions must be read subject to the fact which formed the ground of the decision in each of those cases, that the cause of action had passed into res judicata. I am of opinion that where application to increase the amount of the action is made

(1) Br. & Lush. 84, 87.
(2) 15 Jur. 885, 886.
(3) Br. & Lush. 447, 448.
(4) L. R. 1 A. & E. 45.
(5) Br. & Lush. 84.

before judgment has been pronounced, the Court has power to direct measures to be taken to do full justice to the plaintiff." But he limits any power to rearrest or arrest after bail to applications made before judgment has been pronounced. Therefore it does not help the plaintiff in the present case, because judgment pronouncing for liability had been given before they attempted to arrest. It is also to be noted that in *The Hero* (1) application appears to have been made to the Court for leave to arrest the ship. The other case was *The Flora* (2), and I confess that *The Flora* (2) is a difficult case to follow from the report. It seems from the headnote that the defendant had consented to have the amount in the action increased, and the Court made an equitable order allowing the rearrest to stand, but cancelled the bail bond already given. Nothing of that is said in the judgment or in the argument; and, although Mr. Vernon Lushington (as he then was) relied on *The Kalamazoo* (3) and *The Wild Ranger* (4) for the proposition that there was no power to rearrest without leave of the Court, Dr. Lushington said "it was the practice to arrest the cargo whether freight was due or not, and held the re-arrest to be valid." But on what ground exactly that was done, and how far the question may have been affected by the fact stated in the headnote, which speaks of the amount in the action being increased by consent, does not appear; and I do not think, in face of the distinct expression in *The Kalamazoo* (3) and *The Wild Ranger* (4), that a vessel cannot be arrested after she has been once released on bail in the same action for the same cause of action, that ruling should be departed from. One other case which seems to support my view to some extent is *The Johannes* (5), a decision of Sir Robert Phillimore. The only significance of that case is that the claim to rearrest was abandoned by the eminent counsel who was conducting the case for the plaintiff.

The cases in which rearrest has been allowed are cases

(1) Br. & Lush, 447, 448.
(2) L. R. 1 A. & E. 45, 46.
(3) 15 Jur. 885.
(4) Br. & Lush. 84.
(5) L. R. 3 A. & E. 127.

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with regard to costs, the first of which was *The Freedom*. (1) I am not sure that *The Freedom* (1) really decided that there was power to rearrest for costs, except in the sense that it was the method of execution most convenient in the Admiralty Court, although it has always been treated, I think, as being a rearrest for costs. That course has been followed in *The Lorena* (2)—a case noted in Roscoe's Admiralty Practice, 4th ed., p. 340—and *The Falk*. (3) In those cases the rearrests were for costs after judgment given, and after costs had been ascertained. If bail were given after such an arrest as was effected in this case there would be no judgment against such bail nor any means of obtaining judgment in the action so far as I am aware.

In this case what the plaintiffs have been trying to do is to arrest the ship after they have got bail for their claim and have released the ship, and have got judgment, but before the amount of their claim is ascertained. Under the judgment the assessment of the damages was referred to the registrar, but he has not ascertained what amount is due, and it may well be that it will be some time before he does ascertain it. If the plaintiffs are right in their contention that they are entitled to arrest this ship, it seems to me that it will open the door to the rearrest of vessels, or arrest after getting bail, whenever a party thinks that his claim may be more than he originally thought it was. No immunity from arrest will be obtained by giving bail, and the result of that, on the question of maritime liens, might be very serious. The only right to arrest in a damage case is that which the party claiming has got by a maritime lien, and a maritime lien follows the ship into other people's hands. The position of people who have ships that have been released on bail—if I were to allow this arrest to stand—might be very unfortunate. So far as I know what is being attempted in this case has never been attempted before. I have dealt with *The Hero* (4) and *The Flora* (5), and I have also dealt with *The Freedom* (6) class of case, which seem to me to be

(1) L. R. 3 A. & E. 495.
(2) Unreported. 1906, fol. 21.
(3) 4 Asp. M. L. C. 592.
(4) Br. & Lush. 447.
(5) L. R. 1 A. & E. 45.
(6) L. R. 3 A. & E. 495.

in a different category. I have not referred to *The Zephyr* (1) or to *The Joannis Vatis* (2), because I do not think they carry the matter any further, but I think I have referred to all the other material cases that have been mentioned.

I do not think, in these days at any rate, it is desirable to extend the power of arresting the property of a defendant. It may be hard that Mr. Bucknill's clients may be defeated by the owners of the *Point Breeze* from prosecuting part of a just claim which they may be able to substantiate, because the *Point Breeze* may never come back to this country. I hope that may not be the result, but I cannot help it if it is. Even if an application for leave to arrest had been made —before this arrest was actually made—to try and bring the case within *The Hero* (3), I think leave would have had to be refused upon the same grounds as those which I have already indicated. The motion will be allowed with costs.

Solicitors for the plaintiffs: *Stokes & Stokes.*
Solicitors for the defendants: *Thomas Cooper & Co.*

(1) 11 L. T. 351. (2) [1922] P. 213.
(3) Br. & Lush. 447.

E. C. M. T.

1928
March 23.

ADMIRALTY.

THE ROYAL STAR (No. 2).

Shipping—Appeal from Colonial Court of Formal Investigation—Costs of successful Appellant—Position of Board of Trade—Principles applicable.

The governor of a colony ordered an inquiry to be held by a Court of Formal Investigation into the stranding of a British ship. The Court found the master guilty of negligence and severely censured him, but did not deem it necessary to deal with his certificate. The master served notice of appeal on the Board of Trade, but the Board took the view that no appeal lay unless the officer's certificate had been suspended or cancelled. A motion to determine, as a preliminary point, the question of the right to appeal was decided by the Divisional Court in the master's favour, and at the subsequent hearing of the appeal the master was held not to have been guilty of the acts of negligence attributed to him. On the question of costs :—

Held, as a matter of principle, that as the Board of Trade had not ordered the inquiry, and merely appeared on the appeal in discharge of a public duty, costs ought not to be awarded against the Board ; but that the question of the right to appeal—contested by the Board—raised a matter of public interest, and that the master was entitled to the costs of the preliminary motion.

Appeal by the master of the steamship *Royal Star* from the finding of a Court of Formal Investigation, ordered by the governor of the Straits Settlements and held at Singapore, to inquire into the stranding of the ship in the Straits of Singapore, near Batu Beranti, on January 13, 1927.

The Court found the master guilty of negligence in three particulars, and, while not deeming it necessary to deal with his certificate, had severely censured him.

The case is reported only on the question of costs.

The master gave notice of appeal which was served on the Board of Trade, and also applied for a rehearing. The Board refused the application for a rehearing and raised the objection that no appeal lay unless the officer's certificate had been cancelled or suspended. On a motion to determine this question as a preliminary point the Divisional Court (Lord Merrivale P. and Hill J.) held that the master had the right of appeal and reserved the question of costs until the hearing of the appeal. (1)

(1) Ante, p. 48.

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THE ROYAL STAR (No. 2).

On the hearing, counsel for the Board of Trade said that the Board was impartial and that it was no part of the Board's duty to argue whether the censure was justified or not. He drew attention, however, to various matters which might lead the Court to the view that in passing so near to Batu Beranti light the master was negligent.

The Court held that it was not negligent navigation or bad seamanship to take and maintain the course which the master had set, and that the three grounds on which the master had been censured—namely, omitting to satisfy himself that his charts were up to date, neglecting to read the instructions of the Malacca Strait Pilot, 1924, and neglecting to have bearings taken, could not be upheld.

The appeal, therefore, was allowed.

Dunlop K.C. and *R. F. Hayward* for the appellant. The appellant should be allowed the costs of both hearings. Costs are in the discretion of the Court: see r. 20 (*i*) of the Shipping Casualties and Appeals and Re-hearing Rules, 1923, which provides that "The Court of Appeal [a Divisional Court of the Probate, Divorce and Admiralty Division of the High Court] shall have power to make such order as to the whole or any part of the costs of and occasioned by the appeal as the Court may think just": see also *The Arizona* (1); *The Famenoth* (2); *The Chelston.* (3)

[THE PRESIDENT. The costs of the appeal raise a question not of discretion but of principle. I do not think that the Exchequer—the British taxpayer—should be called upon to pay these costs. The motion to determine the right to appeal—contested by the Board of Trade—affects public interests and is a different matter.]

In *The Famenoth* (4) Sir James Hannen said: "We have given the Board of Trade the costs where it has succeeded. We must apply the same rule in favour of the appellant when the Board of Trade is unsuccessful."

A. T. Bucknill for the Board of Trade. The question of

(1) (1880) 5 P. D. 123.
(2) (1882) 7 P. D. 207.
(3) [1920] P. 400.
(4) 7 P. D. 207, 216.

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THE ROYAL STAR (No. 2).

costs was not argued at all in *The Chelston*. (1) The question was very fully argued in an unreported case later than *The Famenoth* (2), *The Grecian* (3), where the master's certificate had in fact been suspended, and the Court held that although it ought not to have been suspended the Board of Trade could not be ordered to pay the costs, as they had merely taken —as in the present case—a formal part in the proceedings.

THE PRESIDENT (LORD MERRIVALE). I am glad that this matter has been discussed. I think that on principle the appellant is entitled to the costs of the previous argument on December 9 last to determine his right to appeal (4), but that it would not be proper in this case to make any order against the Board of Trade for payment of the costs of this appeal. The Board of Trade did not order the inquiry at Singapore. There is no litigation between the Board and the appellant, and the Board merely appears now in discharge of a public duty. There will, therefore, be no costs on this appeal.

HILL J. I agree.

Solicitors for the appellant: *G. F. Hudson, Matthews & Co.*
Solicitor to the Board of Trade: *The Board of Trade Solicitor.*

NOTE.

ADMIRALTY.

JUNE 10, 1902.

THE GRECIAN.

Appeal by the master of the Allan line steamship *Grecian* from a finding of a naval Court of Inquiry held at Halifax holding the master guilty of negligence which led to the stranding and loss of the vessel near Sandwich Point, Halifax, on February 9, 1902. The Court suspended the master's certificate for three months. On appeal, the Divisional Court held that the negligence was solely that of the pilot of the *Grecian*, and that consequently the master's certificate was wrongly suspended and ought to be restored.

Butler Aspinall K.C. and *A. E. Nelson* for the master asked that the Court should direct the Board of Trade to pay the costs of the appeal on the

(1) [1920] P. 400.
(2) 7 P. D. 207, 216.
(3) See note on this page.
(4) Ante, p. 48.

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THE GRECIAN (Note to THE ROYAL STAR (No. 2)).

authority of *The Arizona* (1) and in accordance with the discretion vested in the Court under r. 20 (*i*) of the Shipping Casualty Rules, 1895. (2)

H. Sutton for the Board of Trade opposed the application.

THE PRESIDENT (SIR FRANCIS JEUNE). I feel the great hardship of the position of this captain, because he has been put to expense in defending himself against a charge which is unfounded, and I should be very glad if some one could be ordered to pay his costs; but I am clearly of opinion that that somebody cannot possibly be the Board of Trade. It is true that in *The Arizona* (1) the Court took the view that the Board of Trade ought to pay the costs, but that was upon the ground that the suspension of the certificate had proceeded upon the instructions of the Board. In this case it appears to me to be clear that the Board of Trade did not initiate the proceedings; they were initiated under a Colonial Act and by a Colonial Legislature. The Board did not in any way cause this appeal, nor have they added in any respect to its expense. They have received a notice properly given them and they are here in accordance with that notice to render any assistance to the Court which might have been of great value; beyond that, the Board have taken no real part in these proceedings.

It appears to be impossible to say that the Board of Trade ought to be saddled with any part of these costs, much as I sympathise with the officer who had his certificate suspended. I do not wish to say there is no power in this Court to give costs; indeed, in *The Arizona* (1), which was under a different Act, it appears to have been done; and the section of the Merchant Shipping Act to which reference has been made, and the Rules, appear to me to show that there might be cases in which the Board of Trade might be treated as parties to these proceedings for the purpose of costs, but my view is that the Board of Trade ought not to be saddled with costs in the circumstances of this special case.

BARNES J. I agree.

(1) 5 P. D. 123.

(2) Identical in language with r. 20 (*i*) of the 1923 Rules.

E. C. M. T.

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Feb. 28;
March 7.

DIVORCE.

SLOGGETT *v.* SLOGGETT.

Divorce—Hearing—Duty of Court to inquire into Matters prescribed by Statute—King's Proctor—Right to intervene before Decree Nisi—Adjournment of Hearing for Attendance of King's Proctor—Directions to King's Proctor—Particulars—Cross-examination and calling of Witnesses by King's Proctor—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *ss.* 178, 181.

By virtue of the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 178, sub-s. 1, it is "the duty of the Court to satisfy itself so far as it reasonably can both as to the facts alleged and also as to whether the petitioner has been accessory to or has connived at or condoned the adultery or not, and also to enquire into any countercharge which is made against the petitioner." In discharging this duty, which was first imposed upon it by the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 29, 30, and is not of a purely judicial character, the Court is entitled to require the services of the King's Proctor. For this purpose the Court may by order direct that the King's Proctor should be represented at the hearing of a cause adjourned for that purpose, and he may take the directions of the Court as to the part to be taken by him in the proceedings and whether he shall cross-examine and call witnesses. Particulars may be ordered of facts or matters intended to be brought by the King's Proctor to the notice of the Court.

Adjourned Summons.

The wife filed her petition, dated December 7, 1926, praying for dissolution of her marriage on the ground of the adultery of the husband. The suit, which was not defended, was heard on May 25 and 26, 1927, and after evidence had been taken was adjourned for argument by the King's Proctor. On February 13, 1928, the King's Proctor issued a summons in the suit asking for directions. The summons was heard on February 20, 1928, and adjourned into Court for argument.

The King's Proctor's case was that a false state of facts had been presented to the Court, and he desired to take part in the proceedings before the conclusion of the hearing, in order to bring the real facts to the notice of the Court, and in view of the doubt prevailing as to the correct practice he made the present application for directions.

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Sir Douglas Hogg A.-G. (*Clifford Mortimer* with him) for the King's Proctor. The question is whether the King's Proctor can take part in the case and call evidence and cross-examine witnesses before the stage of decree nisi. If his action is postponed to a later stage he may have to deal with a false state of facts already presented. The Judicature (Consolidation) Act, 1925, s. 181, provides: (1.) for argument on behalf of the King's Proctor; (2.) that any person may give information to the King's Proctor during the progress of the case or before decree absolute, and that the King's Proctor may take such action thereon as the Attorney-General may consider necessary; and (3.) that the King's Proctor may intervene to prevent collusion. In this case argument was directed under the first head. In *Hudson* v. *Hudson and Poole* (1) it was held that under the second head the King's Proctor can only watch the case and cannot intervene before decree nisi in his official capacity unless he suspects collusion. In *Jackson* v. *Jackson* (2) it appears that Lord Mersey, when President of this Division, and Bargrave Deane J. differed from the then holder of the office of Attorney-General on the question whether the King's Proctor could intervene and call evidence before decree nisi. They thought that he could, and must have doubted *Hudson* v. *Hudson and Poole*. (1) In *Masters* v. *Masters* (3) it was held that the King's Proctor could only intervene in his official capacity when alleging collusion, but might as one of the public show cause against a decree nisi being made absolute. In *Sottomayer* v. *De Barros* (4), however, the view taken by the judges in *Jackson* v. *Jackson* (2) finds direct support. The provision that the King's Proctor may "take such steps" as the Attorney-General may deem necessary prima facie means that he may take part in the proceedings. In *Drummond* v. *Drummond* (5) the King's Proctor intervened, and at the hearing established the adultery of the petitioner. In *Boardman* v. *Boardman* (6) the judge ordinary (Lord Penzance) held the King's Proctor

(1) (1875) 1 P. D. 65.
(2) [1910] P. 230.
(3) (1864) 34 L. J. (P. & M.) 7.
(4) (1879) 5 P. D. 94.
(5) (1861) 2 Sw. & Tr. 269.
(6) (1866) L. R. 1 P. & M. 233.

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entitled to cross-examine all the witnesses of the parties at the hearing on the issues raised by him. In *Dering* v. *Dering and Blakeley* (1) the same judge allowed the King's Proctor in his intervention on the ground of collusion to allege at the same time and before trial any other matters in opposition to a decree.

[LORD MERRIVALE P. The section there referred to is the Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), s. 7, which provides that " at any time during the progress of a cause " the King's Proctor may receive information and take such steps as the Attorney-General may deem necessary.]

In *Gaskill* v. *Gaskill* (2) the Attorney-General appeared as amicus curiæ at a hearing, which was adjourned to enable him to call expert medical evidence. It is the obvious convenience that facts should be laid before the Court before and not after decree nisi. The true view of the effect of the statutes is that taken by Lord Mersey and Bargrave Deane J. in *Jackson* v. *Jackson*. (3)

W. N. Stable for the petitioner. The petitioner offers no opposition to the course proposed if thought desirable by the Court, but if action by the King's Proctor is to be taken before decree nisi notice of his case should be given.

[LORD MERRIVALE P. There is power to order particulars.]

In *Drummond* v. *Drummond* (4) the judge ordinary suggests that objection may be taken to the course proposed. He says : " The pleas (in that case of adultery) should have been demurred to." There is no reported instance of a plea by the King's Proctor before decree nisi, except one alleging collusion. In *Gethin* v. *Gethin* (5) the petitioner's case was ordered to be taken first and the Queen's Proctor's case later. The fact that the Matrimonial Causes Amendment Act, 1873 (36 & 37 Vict. c. 31), which extends to suits for nullity the King's Proctor's powers under s. 7 of the Matrimonial Causes Act, 1860, is silent as to his powers of argument under s. 5 of that Act may be due to the decision in

(1) (1868) L. R. 1 P. & M. 531.
(2) [1921] P. 425.
(3) [1910] P. 230.
(4) 2 Sw. & Tr. 269, 270.
(5) (1861) 2 Sw. & Tr. 406.

Sottomayer v. *De Barros* (1), that in that case instead of argument under s. 5, which may be taken at any time, there ought to be intervention under s. 7, which is to be between the decrees. The second part of s. 7, which deals with that intervention, applies to cases of collusion only. The decision in *Lautour* v. *Her Majesty's Proctor* (2) is adverse to the contention of the Attorney-General. There it was decided in dealing with the question of costs that in intervening otherwise than in a case of collusion the Queen's Proctor had no locus standi beyond that of a member of the public, and that accordingly there was no power to award him costs. Although in *Higgins* v. *The King's Proctor* (3) and *The King's Proctor* v. *Carter* (3) it is pointed out by the Court of Appeal that the decision in *Lautour* v. *Her Majesty's Proctor* (2) was before the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), which now gives the Court a general discretion as to the King's Proctor's costs, that state of things does not affect his powers on intervention. The reference to the King's Proctor in *Gaskill* v. *Gaskill* (4) must have taken place under the Matrimonial Causes Act, 1857, ss. 29, 30. Such intervention as is now contemplated is limited by the statutes to cases of suspected collusion. The steps referred to by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 181, sub-s. 2, are limited to watching and inquiring.

The Attorney-General in reply. The nature of the " steps " to be taken must depend upon the facts of each case. If those facts are other than collusion the King's Proctor is to take the directions of the Attorney-General.

[LORD MERRIVALE P. Your contention is that under the Act of 1925, s. 181, sub-s. 2, the King's Proctor may set up an affirmative case.]

Lautour v. *Her Majesty's Proctor* (2) is distinguishable. In that case a charge of collusion, although made, had failed.

Cur. adv. vult.

(1) 5 P. D. 94.
(2) (1864) 10 H. L. C. 685.
(3) [1910] P. 151, 159.
(4) [1921] P. 425.

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March 7. THE PRESIDENT (LORD MERRIVALE). Directions of the Court are asked in this case with a view to the determination of certain questions which arise from time to time with regard to the powers and duties of the King's Proctor in relation to suits for divorce. The matter arises upon a reference to the King's Proctor made by the Court upon the hearing of an undefended suit wherein upon inquiries by the Court facts appeared which needed investigation.

In view of certain doubts expressed in the course of the proceedings in a case of *Jackson* v. *Jackson* (1) and of the necessity for and importance of the regular conduct of proceedings in divorce the Attorney-General presented the application for the King's Proctor on the summons, in order that, if the proposal should commend itself to the Court, facts resulting from inquiries made and to be made by the King's Proctor should be duly considered at the adjourned hearing of the suit, and that for that purpose counsel nominated by the Attorney-General should be present.

Counsel appeared for the petitioner, and stated that the petitioner did not oppose the application for an order for intervention of the King's Proctor in the present case—if the Court should think it admissible under the statute—but submitted that upon the true construction of the Matrimonial Causes Act, 1860, and Judicature (Consolidation) Act, 1925, intervention of the King's Proctor before decree nisi is limited to cases in which he suspects collusion.

The words in the section which might prima facie appear to warrant action by the King's Proctor in cases like the present were—it was said—those of the enactment which appeared fourth in order among the provisions of s. 7 of the Matrimonial Causes Act, 1860—the section which introduced in the practice of the Divorce Court the decree nisi and is now embodied substantially in the Judicature (Consolidation) Act, 1925, s. 181. It was expressed in these words: "and at any time during the progress of the cause or before the decree is made absolute any person may give

(1) [1910] P. 230.

information to Her Majesty's Proctor of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary." The fact that the section went on to enact that if from any such information or otherwise the Queen's Proctor should suspect collusion he might by direction of the Attorney-General and with the leave of the Court intervene in the suit alleging such case of collusion, was relied on by counsel for the petitioner.

Shortly put the argument upon s. 7 and the corresponding provision of the Judicature (Consolidation) Act, 1925, s. 181, sub-s. 2, is that expressed in the maxim "Expressio unius exclusio alterius est." The generality of the enactment that the King's Proctor may take such steps as the Attorney-General may direct was said to be limited by the subsequent provision for intervention in the suit if collusion is suspected. It was also said there is no express authority for directions by the Court in a case like the present.

The question for decision does not depend upon the precise effect on the powers and duties of the King's Proctor of the successive enactments in the section in question. Wider considerations are involved. It is necessary to take into account the subject-matter of the statute and the various provisions which relate to it. Foremost of them is the enactment originally contained in the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 29, 30, now embodied in the Judicature (Consolidation) Act, 1925, s. 178, sub-ss. 1 and 2, whereby on a petition for divorce it becomes "the duty of the Court to satisfy itself so far as it reasonably can both as to the facts alleged and also as to whether the petitioner has been accessory to or has connived at or condoned the adultery or not, and also to enquire into any countercharge which is made against the petitioner," and in case of an adverse finding against the petitioner in respect of either of the matters specified, or a finding of collusion between the parties, to dismiss the petition. Contrary to the ordinary course of trial of civil proceedings the Court is required not only to deal with issues raised by the parties, but with

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independent matters deemed by the legislature fit to be dealt with, in respect of a larger interest, that namely of the community.

No doubt has ever been thrown so far as I am aware on the peremptory character of the obligation which was cast upon the Court by s. 29 of the Matrimonial Causes Act, 1857. Very soon after the passage of the Act a practical demonstration of its effect was given. In a case of *Lloyd* v. *Lloyd and Chichester* (1) the judge ordinary (Sir Cresswell Cresswell) called for a bill of costs of one of the parties and called and examined a witness on a question which thereon arose and adjourned the case for further evidence, which was dealt with in like manner.

At the time of the hearing of *Lloyd* v. *Lloyd and Chichester* (1) the statute which gave the King's Proctor special duties in relation to suits for divorce had not been passed. The need of some provision such as it enacted was, however, making itself felt.

In a case heard when the Act of 1860, by which this provision was made, was newly in operation : *Forster* v. *Forster* (2), the Judge Ordinary made these observations : "Soon after the Court was established it was suspected that attempts had been made to procure a dissolution of marriage by means of collusion, and there had been other instances in which both the party suing and the party sued were equally anxious to obtain a divorce, and without collusion the party sued abstained from setting up matter which might be set up in answer to the petition. It was in order to check these practices that the statute was passed."

So far as I know the power of the Court to require the services of the King's Proctor in aid of the discharge of its duties under s. 29 of the Matrimonial Causes Act, 1857, has never been seriously questioned. The matter is of course not of a purely judicial character, so far as the administration of justice inter partes is concerned. There are, however, references in reported cases. For example, when Sir James Wilde, afterwards Lord Penzance, had succeeded Sir Cresswell

(1) (1859) 1 Sw. & Tr. 567. (2) (1863) 3 Sw. & Tr. 151.

Cresswell, in a case of *Masters* v. *Masters* (1), the matter was discussed, and in a case of *Richards* v. *Richards* (2) action such as is in question here was taken. Comparatively recent instances in reported cases are found in the action taken by Sir John Bigham P. and Deane J. in *Jackson* v. *Jackson* (3), and by Lord Birkenhead L.C., when he came to the assistance of the Court as a judge in a time of great pressure, in *Gaskill* v. *Gaskill*. (4) Both warrant the view that the several relevant enactments are properly regarded as enabling the Court to seek the aid of the King's Proctor in respect of questions of fact as well as those of the law officers of the Crown upon questions of law at any stage of a case.

Numerous cases were cited before me in which discussions arose as to the limits of the action of the King's Proctor where there was no antecedent direction of the Court. Some of these cases determine that he may intervene in respect of matters other than collusion: *Sottomayer* v. *De Barros* (5); and in his official capacity or as a member of the public: *Lautour* v. *Her Majesty's Proctor* (6); or decide in what cases before the Judicature Act he had a statutory right to costs as against a party to the suit. Discussions which arose on these topics do not affect the more important of the matters now under consideration.

The report of the proceedings in *Jackson* v. *Jackson* (3) indicates a doubt on the part of the law officers at that time as to the extent of the obligation cast on them and on the King's Proctor by the provisions of the statutes. No such doubt, however, was suggested in the more recent case of *Gaskill* v. *Gaskill*. (4) What was then done was consistent with the course taken by Lord Penzance at an earlier time, when perhaps the process of reference to the King's Proctor of matters requiring investigation, in aid of the discharge of the duties of this Court, was easier of comprehension. The King's Proctor was, before the Divorce Court existed, an officer of the Court as a solicitor is now, with defined

(1) 34 L. J. (P. & M.) 7.
(2) (1870) 21 L. T. (N.S.) 598.
(3) [1910] P. 230.
(4) [1921] P. 425.
(5) 5 P. D. 94.
(6) 10 H. L. C. 685.

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duties in the ecclesiastical jurisdiction where probate was dealt with and in the Court of Admiralty. When a new duty and new powers were put upon him his relation to those Courts was matter of common knowledge. Remembrance of that fact helps to a better understanding of the cases before Lord Penzance.

The two questions to be dealt with now are whether the services of the King's Proctor are properly required by the Court in this case, and whether a direction that he should be represented at the hearing can properly be given.

Regarding the first question in the light of the statutory duty of the Court to which the King's Proctor's office is ancillary, I can have no doubt that the direction given him in this case was a valid direction.

Giving the effect which I ought to the submissions made by the Attorney-General, what seems to me proper to be done now is that particulars should be given to the petitioner of facts or matters deemed proper by the King's Proctor to be brought to the attention of the Court, and that at the further hearing of the cause the King's Proctor should be represented in order that such facts or matters may be duly presented and considered.

Solicitor: *King's Proctor.*

Solicitors for the petitioner: *Westbury, Preston & Stavridi.*

R. M. M.

ADMIRALTY.

1928
April 2, 4.

THE CHANNEL QUEEN.

Shipping—Taxation of Costs—Statements from Independent Witnesses before filing Preliminary Acts—R. S. C., Order LXV., *r.* 27, *sub-r.* 29.

In a collision action, before the plaintiffs had filed their preliminary act or statement of claim, the defendants took statements from independent witnesses on other vessels. The plaintiffs shortly afterwards discontinued the action. On the taxation of the defendants' bill of costs the assistant registrar disallowed the costs of obtaining these statements on the ground that there was "a well-settled principle of taxation that a party is only entitled as against his opponent to incur such costs or expenses as will enable him to conduct his case at the stage which the proceedings have reached, and not incur expenses in anticipation of matter, which, as events turn out, never arise":—

Held, that r. 27, sub-r. 29, of Order LXV., which provides that the taxing master is to allow "all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice," was not limited in the way stated by the assistant registrar; that if solicitors could compel the discontinuance of an action, as in this case, by collecting the necessary evidence, they were entitled to do so; that accordingly the costs in question were not prematurely incurred; and that the defendants were entitled to recover them from the plaintiffs on taxation.

SUMMONS to review the taxation of the defendants' bill of costs. The summons, which was taken out by the defendants, was adjourned into Court for judgment.

The plaintiffs were the owners of the dumb barge *Dart* and the owners of the cargo lately laden therein; the defendants were the owners of the steamship *Channel Queen*. The facts and arguments are fully set out in the judgment.

The summons was not attended by counsel.

Cur. adv. vult.

April 4. BATESON J. This is a summons to review taxation. At the desire of the parties I said I would give my reasons in Court.

The taxation arises out of a collision action. The collision, which took place on December 30, 1927, near Horseferry Wharf, was between a coaster and a barge in the Thames. The coaster is a regular trader, and her owners are in London.

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One of the two men on the barge lost his life in consequence of the collision, and on January 4, 1928, an inquest was held at which both the owners of the coaster and the owners of the barge were represented. The main question as regards the collision was as to there being a proper light showing on the barge. On January 7, three days after the inquest, the owners of the barge issued their writ against the defendants. On January 16 the defendants appeared, and on January 24 the defendants filed their preliminary act. The plaintiffs ought to have filed their preliminary act seven days after the writ, but did not do so. On February 10 a final order that they should within seven days file their preliminary act was made against the plaintiffs, and on February 11 they discontinued their action.

In the meantime, the defendants, on being sued, had naturally sought for evidence outside their own crew so as to test whether they had a good or a bad case, and to be prepared to meet the plaintiffs' case. The defendants' solicitors found that two tugs had been in the vicinity and that their masters, and the mate of one of them, could give valuable evidence. They took statements; paid the witnesses for their time and trouble in coming to give statements—2*l.* 12*s.* 6*d.* to one of the masters and 2*l.* 2*s.* each to the other master and the mate—not unreasonable sums according to my experience of days before the war; and copied out the statements to put before counsel when settling the defendants' preliminary act. The statements were taken while the facts were fresh in the minds of the witnesses. In addition the defendants' solicitors also got copies of the depositions before the coroner, and the copy of a police report.

The learned assistant registrar has disallowed all those items on the principle he states at the beginning of his answer to objections. He says: "It is a well settled principle of taxation that a party is only entitled as against his opponent to incur such costs or expenses as will enable him to conduct his case at the stage which the proceedings have reached, and not incur expenses in anticipation of matter

which, as events turn out, never arise." I do not know where that principle comes from and if taxation is limited in the way which he has limited it in this case I think it is wrong. Order LXV., r. 27, sub-r. 29, lays down what is to be allowed, and Atkin L.J. in *Société Anonyme Pêcheries Ostendaises* v. *Merchants Marine Insurance Co.* (1) dealing with this rule, says: "It was intended to sum up generally the principles upon which costs are awarded, and I cannot help thinking that if that rule were really rigorously applied by everybody—and by 'rigorously applied' I mean applied in all cases, and giving full effect to the width of its language—there would be far fewer complaints brought by successful litigants than are brought at the present moment, because it is a rule which is intended to give to the successful litigant a full indemnity for all costs reasonably incurred by him in relation to the action. I think it says so in terms, that it is to allow 'all such costs as shall appear to him to have been necessary or proper for the attainment of justice.' That is the whole principle on which the taxing master has to determine." Further on, when dealing with the facts of the case, and Mr. Simey's argument, Atkin L.J. says: "There is one other point which was raised by Mr. Simey, and it was this, that no costs can be incurred (that is to say, properly incurred at all, as I understand him) in the action, until the issues have been determined (that is to say, have been defined); and he says that these costs were incurred before the defendants had delivered their defence or indicated what their defence would be. All that I can say is that that goes very much too far. That would mean this, that the litigant would never be entitled to recover any costs, save the actual costs of proceedings, until the defendant had delivered his defence, because until then the issues are not defined. That again does not seem to me to be the right view. The question is, in every case, what is the reasonable thing to do, and the taxing master is not bound by any such limit of time as is mentioned." Mr. Roscoe,

(1) (1928) 44 Times L. R. 270, 273, since reported [1928] 1 K. B. 750, 762, 763.

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at p. 429 of his Admiralty Practice (4th ed.), says much to the same effect.

My view is that the learned assistant registrar has felt himself bound in this case by a limit of time. In his reasons what he says in effect, is that these costs were incurred in premature preparation for the trial, and were not necessary at that stage of the proceedings. In my view the trial is not the only thing to be looked at. The solicitors, in dealing with the matter, must be in a position to give proper advice, and if they can kill an action—as they did in this case—by collecting all the evidence that is necessary, I think it is quite proper that they should do so. The plaintiffs themselves saw one of the witnesses that the defendants saw (I think they saw him before the defendants had seen him) and they paid that witness the same amount as the defendants are charging in their bill. That was of course before they discontinued their action. Then the learned assistant registrar quotes *The Neck* (1)—a case which is not reported and the facts as to which I am told cannot now be ascertained. It was a salvage action in which the plaintiffs apparently had taken a good deal of evidence which might well not have been taken, and Barnes J. disallowed the costs of that evidence, saying, according to the assistant registrar, that they were entitled, as against the defendants, to the costs of taking such evidence only as was required for the framing of the statement of claim. That case only refers to plaintiffs, and not to defendants. It may very well be that in that case it was proper to disallow the costs.

The learned assistant registrar goes on to say that all the defendants required was sufficient evidence to enable counsel to settle their preliminary act. That, again, I do not think is right. In the first place in my opinion this evidence was necessary to settle the preliminary act. The preliminary act in an Admiralty case embodies the party's case. He cannot change it. If it is drawn on half the evidence it very likely will land the party in difficulties. It is essential to get up a case in Admiralty at the beginning. It is no use to

(1) (1904) Fo. 22.

have independent witnesses, as they are called, after the other party has defined his issue. He may delay that for months. I do not think that any self-respecting junior, if he could avoid it, would settle a preliminary act unless he had all the evidence before him that could be obtained. I gather that the assistant registrar thinks that this evidence is necessary for the solicitor against his own client, and I cannot see why it is not equally necessary against the other party. I do not consider that it is over caution or unnecessary, and I think it is every day practice for solicitors to get this evidence; it agrees with such little knowledge as I have, which dates back to work in a solicitor's office some thirty-seven years ago. The assistant registrar has allowed in this taxation a fee to a surveyor who was called in merely to attack the bill of the plaintiffs for their damage, if that ever came to be considered. Of course in the early stages of this particular case that would never arise. Then he goes on to discuss the payments to these witnesses, and describes it as blackmail. But in my view witnesses of the class of those from whom statements were taken in this case were not unduly paid at the figures which were put in the bill of costs. If exorbitant fees are asked for it would not be proper to pay them. In some cases these sort of payments are included in instructions for brief—whether it is done in one way or another does not seem to matter—or they are allowed as sums paid, which I think would be the better way to do it, but they are the sort of payments that are generally made. What I have said covers the question of taking the statements and copying them for counsel, and payments to the witnesses for their time.

One of the other matters that was dealt with was the report of the police officer, which I think ought to be allowed—it is a very small sum—and also the copy of the depositions before the coroner. That is a matter which I think might well have been delayed, until it was known whether or not the case was going on. The parties had attended the inquest, and, of course, a proper fee should be allowed for that, but having attended the inquest, and having heard all the

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evidence, I do not think it was necessary to get the details in full before the case was really coming on, or reasonably thought to be coming on.

I think that deals with all the questions that were raised. For these reasons I think the matter must go back to the learned assistant registrar to tax on the lines that I have indicated.

Solicitors for the plaintiffs: *J. A. & H. E. Farnfield.*
Solicitors for the defendants: *Thomas Cooper & Co.*

E. C. M. T.

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Feb. 16, 17, 28, 29; *March* 1, 2, 6, 19.

PROBATE.

THOMAS AND ANOTHER *v.* JONES AND OTHERS.

Probate—Practice—Costs—Executors—Will propounded by Executor—Allegations of Testator's Incapacity—Will other than Contents of residuary Clause pronounced for—Residuary Clause excluded from Probate—Conduct of Executors—Order LXV., *r.* 1.

The principle of the decision in *Wild* v. *Plant* [1926] P. 139, that executors who have established the validity of their will are entitled to their whole costs of the litigation although they fail in establishing a codicil, does not extend in all cases to costs incurred by them by reason of their insisting upon probate not only of clauses in a will expressing the testamentary mind of their testator but also of a clause which is found not to be his testamentary act. If a residuary gift is excluded from probate on the ground of want of capacity the question still arises whether the costs so incurred by the executors are due to their "violation or culpable neglect of duty." If the Court finds on this issue that an executor is a wrongdoer his prima facie right to receive out of the estate costs not otherwise provided for is displaced.

THE plaintiffs, H. J. Thomas and W. T. Banbury, propounded as executors a will of John Llewelyn Jones dated May 5, 1927. Alternatively they propounded an earlier will dated November 2, 1926, of which they were also executors along with one H. Davies, a friend of the widow of the deceased. The defendants were Minnie Jones, the widow of the deceased, and Frederick Turner and Thomas Turner, her two sons by a former husband, all of whom took

a larger interest under the earlier than under the later will. Under the later will one of the residuary legatees was the daughter of the plaintiff Thomas, who had acted as the solicitor of the deceased in the preparation of both wills. She was also one of the principal pecuniary legatees. The defendants put the plaintiffs to proof of the due execution of the later will, to which they pleaded want of knowledge and approval by the deceased and his general unsoundness of mind, and they claimed probate of the earlier will. The case was tried by the President (Lord Merrivale) sitting without a jury on six days in February and March, 1928, and judgment was reserved and pronounced on March 6, 1928. The result of the evidence as found by the President was that before April 29, 1927, the later will had been determined on as to all its contents except the residuary clause, that the details of the residuary clause remained at large when on April 29 the testator ceased to be of testamentary capacity, and that on the date of execution of the will, although the testator remembered that he had been engaged with Thomas in preparing a will and appreciated the fact that he was being asked to execute it, he remained without present testamentary capacity.

The case is reported on the question of costs.

Further details of the findings of fact arrived at by the Court as to the material conduct of the plaintiffs on the question of costs are given below in the further reserved judgment dealing with costs.

March 6. On the issues as to the testamentary papers the President, deciding that the case fell within the principle of *Parker* v. *Felgate* (1), as approved by *Perera* v. *Perera* (2), came to the conclusion that the testator's execution of the will of May 5 so far as it had been resolved upon while he had capacity was, pro tanto, good execution, but that the residuary clause was severable and must be excluded from probate, and that probate of the remaining parts of that will could and ought to be granted.

(1) (1883) 8 P. D. 171. (2) [1901] A. C. 354, 361.

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Bayford K.C. (*Clifford Mortimer* with him) for the plaintiffs. The plaintiffs should have their costs out of the estate. They were compelled as executors to come to the Court to get a decision what papers should be admitted to probate, and are in any event entitled to their costs: Order LXV., r. 1 (1); *Wild* v. *Plant.* (2) They cannot be condemned in costs. The plaintiff Banbury was not even privy to the will making, and is clearly entitled to costs.

Willis K.C. (*R. M. Middleton* with him) for the defendants. The plaintiff Banbury need not have propounded the will at all. So far as he is concerned the case is covered by *Haydon* v. *Pring.* (3) The fact that a party is an executor, even a nude executor, is no excuse for setting up a will improperly: *Rennie* v. *Massie.* (4) In this case the plaintiff Thomas was setting up a will under which his daughter was a beneficiary. The plaintiffs, though executors, are in the same position as to costs, as they have partially failed, as any other party unsuccessfully propounding a paper: *Twist* v. *Tye.* (5) *Wild* v. *Plant* (2) is distinguishable. In that case the plaintiffs, the executors, had no pecuniary interest, and there was no evidence to show that they had acted improperly.

Bayford in reply.

Cur. adv. vult.

March 19. THE PRESIDENT (LORD MERRIVALE). Probate of the will of May 5, 1927, excepting the residuary clause having been decreed, the question as to costs arose, which it is necessary now to determine. On behalf of the plaintiffs,

(1) Order LXV., r. 1: "Subject to the provisions of the Act and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge. Provided that nothing herein contained shall deprive an executor, administrator, trustee or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division."

(2) [1926] P. 139.

(3) [1919] P. 131.

(4) (1866) L. R. 1 P. & M. 118.

(5) [1902] P. 92.

the executors, it was said that they had established the will of the testator and that whether they got judgment with costs, or not, they had become entitled as a matter of law, and without any order of the Court, to take their costs out of the estate. As to the costs of the defendants it was submitted that while there is a discretionary power in the Court to leave the defendants to pay them, or to order payment of all or part out of the estate, there is no power in the Court to order payment by the plaintiffs.

The rules of practice, if not of law, with regard to the costs of executors in and about probate of testamentary papers were fully discussed recently in the Court of Appeal in the case of *Wild* v. *Plant* (1), and it was definitely determined that under the Judicature Act and Rules, and especially under Order LXV., r. 1, an executor who succeeds in an action here in establishing a will is prima facie entitled to have costs as between solicitor and client out of the testator's estate and that he has this right absolutely unless, in words quoted with regard to a trustee by Jessel M.R. in *Turner* v. *Hancock* (2), the prima facie right is "lost or curtailed by such inequitable conduct . . . . as may amount to a violation or culpable neglect of his duty," and subject to the limitation stated by Lindley L.J. in *In re Beddoe* (3), that the costs and charges in question are "costs charges and expenses properly incurred." The plaintiffs are entitled to be reimbursed from the testator's estate costs and charges properly incurred. Are they entitled then, as a matter of law in all events, to costs incurred by reason of their insisting upon probate not only on clauses expressing the testamentary mind of the testator but of a clause which was not his testamentary act? This must depend, I think, upon the two tests supplied by the authorities I have mentioned. Did they properly incur these additional costs, or were the same incurred by reason of a "violation or culpable neglect of duty"? The answer to the inquiry so raised depends on a clear view of the conduct of the plaintiff

(1) [1926] P. 139. (2) (1882) 20 Ch. D. 303, 305.
(3) [1893] 1 Ch. 547, 558.

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Thomas. Not with a sole regard to his duty as a solicitor he laboured whilst the testator's powers were failing to secure a will in form advantageous to a member of his family. In a position in which his parental interests constantly influenced his action he had long interviews with the testator, professedly as a friend, of which no account could be had except his own. With accurate information of the opinion of the medical attendants as to his client's desperate condition he omitted to consult them as to the client's dispositive capacity. He moreover omitted to secure that there should be competent independent evidence of the client's capacity to execute a will.

After the death of the testator the plaintiff Thomas on behalf of the executors unsuccessfully used ingenious means to secure statements, in support of the will of May 5, from the doctors and others, and knowing the opinion of the doctors that their patient had not testamentary capacity at the material times, the plaintiffs did not call them as witnesses. This course was taken not because the plaintiffs, as executors, challenged the honesty or competence of the medical men, but because as litigants, and one of them an interested litigant, they desired the tactical advantages of cross-examination of the doctors as witnesses called by their opponents.

In all the things on which I have dwelt the course of the plaintiffs was governed by the interests of the plaintiff Thomas. The issues involved in the trial were confused and the length of the hearing was very substantially increased by the mode in which the plaintiff Thomas fell back on vague general statements when critical matters were in question, and the difficulty thus caused in testing material allegation of fact which rested entirely on the scanty testimony as to his own conduct which he—an interested witness—gave to the Court.

In my judgment a solicitor who knowingly and for his own purposes involves his own affairs and interests with those of his client, without the client's effectual consent, or where there is doubtful capacity and no competent proof of a capable consent, is a wrongdoer. Being in a position of

trust he disregards his fiduciary obligation. This I find to have been done by the plaintiff Thomas. There are, therefore, grounds in this case for an order which infringes a prima facie right of executors propounding a will to receive out of the testator's estate costs not otherwise provided for. In some particulars the position of the two plaintiffs differs. The plaintiff Banbury had not the skill or knowledge any more than he had the professional responsibility of the plaintiff Thomas. At an early period after the testator's death, however, with abundant means of knowledge of the doubts which existed, he made common cause with his co-plaintiff. I accept the evidence of Dr. Dunbar, in preference to his, as to what took place at an interview when Banbury had full means of knowing the nature and prospects of the controversy over this will of May 5. The evidence of the testator's widow and his sister gave me a surer view, also, as to the state of the testator after May 5, than did Banbury's account of it. Further, for the conduct of the cause as a whole he must be held jointly responsible with his co-plaintiff. I must not disregard either the view expressed in the Court of Appeal in the cause of *Haydon* v. *Pring* (1), that in proceedings for probate an innocent executor may be involved in liability for costs involved by the action of an executor affected by knowledge. Ascertainment by taxation of the proportion of the costs, liability for which ought not to fall on the estate, is in the present case impossible. There is no clearly severable issue with regard to which they can be measured. Probably the costs in this action were doubled by the errors in conduct which I have found to be established against the plaintiff Thomas. I am satisfied beyond doubt that they were increased by more than a third.

I therefore direct that the plaintiffs' costs of the action be taxed, and that as to one-fourth of the ascertained amount they be borne by the plaintiffs personally. The defendants' costs have also to be dealt with. The defence, though no doubt inspired by a natural sense of grievance which was not

(1) [1919] P. 131.

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an actionable wrong, supplied the Court with much necessary information not provided by the plaintiffs. The will of May 5 was established without the residuary clause. As to the residuary estate there is an intestacy, and the widow and the next of kin have a statutory interest in its distribution. To direct payment of the whole of the costs of the defendants out of this fund would be manifestly unsatisfactory. On the other hand neither the whole of the costs nor a separable part of them attributable to a distinct issue can be taxed against the plaintiffs either as executors or personally.

In the event I have arrived at the conclusion that three-fourths of the costs of the defence should come out of the estate, and that, as the defendants' costs were needlessly increased in like manner with the costs of this action as a whole, one-fourth of the defendants' costs should be paid by the plaintiffs personally.

Solicitors for the plaintiffs: *Kinch & Richardson, for H. J. Thomas, Cardiff.*

Solicitors for the defendants: *Wrentmore & Son, for Ewan G. Davies, Cardiff.*

R. M. M.

DIVORCE.

1928

Feb. 22;
March 27.

WOODLAND *v.* WOODLAND OTHERWISE BELIN.

Husband and Wife—Nullity on Ground of Bigamy—Previous Suit for Restitution of Conjugal Rights—Finding of Validity of Marriage in previous Suit —Estoppel.

A decree for restitution of conjugal rights with the usual finding that the parties to the suit are husband and wife, though it may not directly affect their status, nevertheless proceeds upon the basis of their status being thus conclusively established inter partes. A respondent in a suit for restitution of conjugal rights, who does not resist such a finding, cannot afterwards dispute the validity of the marriage of the parties. A subsequent suit for nullity of the marriage, in which bigamy is alleged to have been in fact committed by one of the parties to it, does not after this finding of its validity as between them afford any exception to the general rule of estoppel.

PETITION by the man for nullity of marriage on the ground that the marriage which was celebrated on December 5, 1914, was bigamous, the woman having a husband living at the date of it.

The respondent by her answer alleged that her former marriage, the factum of which she admitted, had on November 18, 1914, prior to the ceremony celebrated between her and the petitioner been dissolved by a Court of competent jurisdiction—namely, the Civil Tribunal of the Seine, sitting at Paris in the Republic of France. The French Court had in fact pronounced a preliminary decree of divorce on November 18, 1914, but it was established by expert evidence of French law that at the date of the celebration of the marriage of the petitioner and the respondent in London on December 5, 1914, no final decree of the French Court was in force by reason of certain requirements of French law as to an interval of time and the transcription of the decree not having been complied with. The question now arising was whether the present petitioner could avail himself of this imperfection in the French proceedings or whether he was estopped from alleging the same by reason of a prior proceeding in this Court. The prior proceeding in question consisted of the institution

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and prosecution in 1921 by the present respondent against the present petitioner of a petition for restitution of conjugal rights. The present petitioner did not defend that petition, and in due course a decree for restitution of conjugal rights had been pronounced, the decree containing in the usual form an express finding that the parties were husband and wife.

On the present petition coming on for hearing on February 22, 1928, Hill J. adjourned it for argument on the question of law whether the petitioner was not estopped from proceeding by reason of the finding in the former decree which he had not resisted.

March 27. *G. C. Tyndale* for the respondent. In the converse case of jactitation of marriage there is authority that the sentence of the Court is conclusive evidence as to the factum of marriage: *Clews* v. *Bathurst* (1); *Da Costa* v. *Villa Real.* (1) If this is so in jactitation, which does not primarily affect status (*Duchess of Kingston's* case (2)), it must a fortiori be so in cases of restitution in which the validity of the marriage is directly in issue and decisively pronounced upon. In *Reg.* v. *Inhabitants of Wye* (3), in which case paupers had been described in an order of the magistrates as husband and wife, Lord Denman C.J. said: "The principle . . . . is a perfectly sound one; that a matter once examined into and decided by a competent tribunal shall not be reagitated, and in effect shown to have been decided erroneously, upon new evidence which either could or could not have been, but in fact was not, produced upon the former hearing." So also per Wigram V.-C. in *Henderson* v. *Henderson.* (4) The question is whether one trial concludes the matter: *In re Hilton.* (5) *Humphries* v. *Humphries* (6) is precisely in point as to the effect of a defence not having been set up in a prior proceeding. As was the case in *Rudd* v. *Rudd* (7) the restitution proceedings offered

(1) (1734) 2 Stra. 960.
(2) (1776) 2 Smith's L.C., ed. 1915, p. 761.
(3) (1838) 7 Ad. & E. 761, 770.
(4) (1843) 3 Hare, 100, 114.
(5) (1892) 67 L. T. 594.
(6) [1910] 1 K. B. 796.
(7) [1924] P. 72.

a generally recognized opportunity for testing the validity of the marriage. The materiality of the respondent's knowledge of the previous proceedings at the time of them is pointed out in that case.

Hon. Victor Russell for the petitioner. This is a question of status. In *Cowley* v. *Cowley* (1) Sir Samuel Evans P. contemplates in his judgment the possibility of the validity of the marriage being called in question after the finding of it in a decree of restitution. Marriage contracts are not like other contracts. Though there may be estoppel between the parties, which is the force of the argument against me, public policy comes into play with reference to a marriage: *Bonaparte* v. *Bonaparte* (2); *Miles* v. *Chilton.* (3) The Court is not debarred by the act of the parties from inquiring into the validity of a marriage. Estoppel is only a rule of evidence. The Court is not bound by it in matrimonial proceedings, if it is not satisfied that all the truth is before it: *Harriman* v. *Harriman.* (4) There are certain limits to estoppel. Lord Cairns L.C., in *Phosphate Sewage Co.* v. *Molleson* (5), in dealing with res judicata, says: "The only way in which that (i.e., a new litigation) could possibly be admitted would be, if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case and I will show you further that it was not, and could not by reasonable diligence have been, ascertained by me before." There was no want of diligence shown on the petitioner's part. He was without funds to investigate the French proceedings. The Court will not relax its control upon the marriage contract, whatever the act or default of a party.

HILL J. [after stating the facts:] I cannot see how the petitioner can be heard to say that he did not become the legal husband of the respondent by reason of the ceremony of December 5, 1914. In 1921, the respondent brought

(1) [1913] P. 159.
(2) [1892] P. 402, 410.
(3) (1849) 1 Rob. Ecc. 684, 697.
(4) [1909] P. 123, 144.
(5) (1879) 4 App. Cas. 801, 814.

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proceedings for restitution of conjugal rights. She had to allege the marriage in her petition. The Court would have no jurisdiction to make a decree of restitution of conjugal rights until it found the marriage. The decree of this Court pronounced in terms that the petitioner "had sufficiently proved the contents of the petition," and that "the respondent, and the petitioner were and are lawful husband and wife," and ordered "that the said respondent do return to the petitioner and render her conjugal rights," and so on. It may be that such a decree does not directly affect the status of the parties, but it is a final decree and it can only be made upon the finding of status—namely, that the husband and wife were and are lawful husband and wife. The husband and wife were both parties to that suit. The husband appeared, and he put in no answer, but he might in that suit have traversed the wife's allegation of the marriage; he might have put the marriage in issue. He did not do so. It may be—and I think it is the fact—that at that time he had not ascertained that there was any ground for disputing the validity of the marriage, but he did not file an answer, and the decree went by default upon proof by the wife of the marriage, which at that time no doubt she believed to be a valid marriage, and upon proof of the other matters entitling her to a decree. Can it be that in such circumstances it is now open to the petitioner to allege that the marriage was not a valid marriage? No doubt in some respects the questions which arise under a contract of marriage are different from questions which arise under other contracts, but I have listened to the arguments and attended to the cases that have been cited, and I am unable to find that there is anything in the law peculiar to this division which renders the general law of estoppel inapplicable to this case. As stated in Art. 41 of Stephen's Digest of the Law of Evidence: "Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case, actually decided by the Court and appearing from the judgment itself to be the ground on which it was based: unless evidence was admitted in the action in which the judgment was delivered which is excluded

in the action in which that judgment is intended to be proved."

The marriage was directly in issue in the proceedings for restitution. It was actually decided by the Court, and the Court could not have made a decree without finding that it was a valid marriage. It appears from the judgment itself to be the ground upon which it was based; there was a finding that they were lawful husband and wife. I can see no reason for saying that, because this was a marriage contract, I am to refuse to apply the principles laid down in the cases several of which have been cited to me. In this view I am very much assisted by the case of *Wilkins* v. *Wilkins* (1), in which it is clear that Gorell Barnes J. felt the same difficulty which presented itself to me when this case was opened. In that case the wife took proceedings for judicial separation on the ground of the husband's adultery and the husband put the marriage in issue. The jury found against him and a decree for judicial separation was made. He put the marriage in issue on the ground that a previous husband of the woman was alive, but the jury found otherwise. Apparently the previous husband had not been heard of for nearly forty years, but he appeared after the finding of the jury and the respondent then petitioned for nullity. Gorell Barnes J. had no doubt that the man in question was the real first husband, and was alive, but he felt a difficulty in making a decree of nullity by reason of the verdict and decree in the former suit, and he adjourned the consideration of the case in order that the then petitioner might make an application to the Court of Appeal. He felt the same difficulty as I feel. It is quite true that there the validity of the marriage had been put in issue by the husband and the question had been fought out, but that can make no difference. In this case, on the wife's petition for restitution of conjugal rights, she alleged the validity of the marriage, and the husband, if he had chosen, might have appeared to traverse it, but he did not choose to do so at that time and he did not. Therefore, I

(1) [1896] P. 108.

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have every reason in my view for feeling the same difficulty as Gorell Barnes J. On the suggestion of the judge that he should adjourn the consideration of the case so that an application could be made to the Court of Appeal, an application was made, but the way in which the Court of Appeal dealt with it was to extend the time for appealing, and it was not suggested in the Court of Appeal that the decree was not binding so long as it stood, and indeed Kay L.J. clearly expressed his view that it was binding. He said: "But as evidence is now forthcoming which could not by the exercise of reasonable diligence have been obtained at the first trial, there must be some mode of getting over an estoppel arising from a verdict which was obtained under a misapprehension of the real facts. In my opinion we have jurisdiction to enlarge the time for moving for a new trial of the first suit, and I am also clearly of opinion that the case is one in which the jurisdiction ought to be exercised." The estoppel was clearly recognized. I must dismiss the petition.

Petition dismissed with costs.

Solicitor for the petitioner: *Warden Gowing.*

Solicitors for the respondent: *R. C. Bartlett & Co.*

R. M. M.

ADMIRALTY.

1928
April 2, 3, 4.

THE UNION.

Shipping—Collision—Stopping Engines in Fog—"Stop and slow ahead" to maintain a "dead slow" Speed—Regulations for preventing Collisions at Sea, 1910, *art.* 16.

By art. 16 of the Collision Regulations "a steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over":—

Held, that to comply with the direction to "stop" and then "navigate with caution" a vessel should run her way off and bring herself as nearly as possible to a standstill; and that a vessel which alleged that, on hearing the fog whistle of the other vessel, she went dead slow by stopping her engines and then putting them slow ahead, and so continued alternately stopping and going slow ahead, was not complying with the provisions of the article.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the Italian steamship *Vulcano*; the defendants were the owners of the French steamship *Union*. The collision occurred on October 18, 1927, in the River St. Lawrence. The *Vulcano*, a steel screw steamship of 5398 tons gross register, was on a voyage from Montreal to Gibraltar with a cargo of grain. The *Union*, a steel screw steamship of 6388 tons gross register, was inward bound to Montreal from Barry, in ballast.

The case is only reported upon the interpretation of art. 16 of the Regulations for Preventing Collisions at Sea. According to the statement of claim (but not according to the findings of the Court) the *Vulcano* was making about three knots through the water with engines working at slow speed ahead when those in charge of her heard a prolonged blast from a steamship, which proved to be the *Union*, on the starboard bow. Those on the *Vulcano* sounded a prolonged blast in reply "and at the same time gave orders to the engine room through the speaking tube to go as slow as possible, and the engines were immediately stopped for one minute and then put slow ahead for two or three minutes and were then again stopped

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for a minute and then put slow ahead, and after two or three minutes were stopped again, and by these means a speed of about one and a half to two knots, which was sufficient for bare steerage way, was maintained."

Dunlop K.C. and *A. T. Bucknill* for the plaintiffs.
Langton K.C. and *Lewis Noad* for the defendants.

BATESON J. I am satisfied that both ships are equally to blame, but I do not believe that either side's witnesses have given me the real facts. Both these vessels were going too fast in a dense fog. Neither stopped when hearing the other, and I cannot find any difference in the degree of fault in either vessel. I believe that both vessels were going at about the same speed, if anything the *Vulcano* a little the faster, but so little that there is no possibility of finding any difference in the degree of fault.

The collision happened at about 11.45 a.m. in the River St. Lawrence at about two miles N.W. of the No. 25 buoy below Father Point. The wind was easterly and moderate ; the weather was very foggy with a visibility of about 600 feet ; and the tide was flood with possibly a little drain up of about half a knot.

The *Vulcano* was coming down the river, in the vicinity of Father Point, where she had anchored on account of fog at about buoy No. 37. She started on a course of N. 47 or 48 E. true, at full speed, which is eight or nine knots. She saw there was fog ahead, coming in thick again, and she started to sound her whistle ; then she ran into dense fog at full speed. Shortly afterwards she heard the whistle of the *Union*, but she did not stop. The evidence from the *Vulcano* was that when those on board heard the whistle they went dead slow, and dead slow on that ship was accomplished by stopping the engines and then going on slow ahead again. It is said that that system of going dead slow is equivalent to a compliance with art. 16 of the Sea Rules which provides that "[a steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case

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THE UNION.

Bateson J.

admit, stop her engines, and then navigate with caution until danger of collision is over." I do not agree. I think the *Vulcano* intended to go on dead slow and not to stop, but even if that were the true case I do not think that such stopping and going on again at slow is a compliance with the rule to stop and navigate with caution. In my view the meaning of the rule is that the engines must be stopped and the way run off the ship. Perhaps then you may go on again if you have heard nothing else but the one whistle from the other ship, although, if nothing more has been heard at all, I doubt very much if you are justified in going on until you do, or can be reasonably sure that there is no risk. At any rate, the proper course is to bring the ship as nearly as possible to a standstill before going on. The *Vulcano* probably heard more than one whistle. She certainly ought to have done so, and her look-out was bad if she did not; but to get over the difficulty of not stopping she said that she only heard this one whistle in ten minutes and without any intermediate sound until the other vessel came in sight. Her times in my view are quite untrustworthy. I think that the *Vulcano* started at eight or nine knots and continued that speed until she heard the first whistle of the *Union*. She ought to have heard several, and there was no real reduction of her speed until the last when the *Union* was sighted fine on the starboard bow and the *Vulcano* went full speed astern. [His Lordship then dealt with the navigation of the *Union* and said that she was also to blame for excessive speed and for not stopping shortly after she got into the fog when she heard the whistle of the *Vulcano*.] I hold both ships to blame in equal degrees.

Solicitors for the plaintiffs: *Thomas Cooper & Co.*
Solicitors for the defendants: *Wm. A. Crump & Son.*

E. C. M. T.

C. A.
1928
June 5.

[IN THE COURT OF APPEAL.]

In the Goods of GATES.

Will—Construction—Bequest of "all my money"—Partial Intestacy—Right to Grant of Administration—Non-contentious Probate Rules, r. 119.—*Consent Order.*

APPEALS from a decision of the President (Lord Merrivale). (1)

The testator, Alfred Gates, who died on April 21, 1927, duly executed a will dated March 21, 1927, in the following words: "I leave all my money to Alfred George Cabell."

On February 15, 1928, A. G. Cabell moved for a grant of administration with the will annexed. The estate consisted of cash in the house and at the bank, a mortgage debt, stocks and shares, furniture and an equity of redemption of freehold property. The parties interested in an intestacy resisted the application.

The President (Lord Merrivale) held that in the absence of any context the will disposed of the whole estate, except the equity of redemption and the furniture, but that the application failed, the persons entitled in intestacy taking the grant in priority to a legatee or devisee under r. 119 of the Non-contentious Probate Rules, which came into operation on January 1, 1926, in the case of an estate not wholly disposed of.

The order as drawn up (omitting formal parts) was as follows: "[The Court on the 15th day of February aforesaid having found that the will of the deceased bearing date the 21st day of March, 1927, disposed of all the estate of the deceased except the equity of redemption and the furniture] It is ordered that the motion herein be dismissed [the applicant not being the residuary legatee or devisee]. And it is further ordered that the costs of this motion be taxed as between solicitor and client and that such costs be provided by the administrator out of the estate of the deceased [rateably]. And it is further ordered that letters of administration with the will annexed be granted in common form."

(1) Ante, p. 128.

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GATES, *In the Goods of.*

Notices of appeal from this order were given by both parties.

On April 23 an application was made to the President for a decision with regard to certain assets which had been discovered since he gave judgment, but he referred this matter for decision to the Court of Appeal, as the appeals were then pending.

The appeals came on for hearing on June 5, 1928, and an arrangement was then come to between the parties that the order of the President should be varied by omitting all reference to the question of the construction of the will.

Spens K.C. and *G. C. Tyndale* for the parties interested in an intestacy.

Gover K.C., *Clifford Mortimer* and *W. Latey* for A. G. Cabell.

THE COURT (LORD HANWORTH M.R., LAWRENCE and RUSSELL L.JJ.) by consent directed that the President's order should be varied by omitting the words in brackets in the order with reference to the decision as to which portions of the estate passed under the will to the applicant A. G. Cabell, the effect of which omission would be that letters of administration in common form with the will annexed would issue to the next of kin, and, failing a settlement, any questions relating to the construction of the will would have to be determined de novo in the Chancery Division.

Solicitors: *Bartlett & Gregory, for Bartlett & Sons, Sherborne; Reynolds, Sons & Gorst.*

W. I. C.

1928

March 30;
April 2, 3, 4;
May 11.

ADMIRALTY.

THE PENELOPE.

Shipping—Charterparty—Time Charter for successive Voyages—Exceptions as to Strikes and Stoppages of Labour—Coal Strike of 1926*—Delay—Impossibility of Performance—Frustration of Adventure.*

A time charter was entered into on March 24, 1926, whereby it was agreed that the defendant's ship, during twelve months from a date to be fixed between May 20 and June 20, 1926, should be employed in carrying successive cargoes of coal for the plaintiffs from one of the South Wales ports to one of certain specified Mediterranean ports. There were various printed exceptions relating to strikes and stoppages of labour, and, by an additional clause, the ship was not to be ordered to any loading port at which there was a strike in force, and she was to be free to interpose a substantially similar voyage if the charterers were unable forthwith to order her to another loading port stipulated in the charter free of strike.

On May 1, 1926, the general coal strike began, and no coal could be exported from any of the named ports until towards the end of December, 1926. Meanwhile, the ship performed two voyages with the assent of the plaintiffs and one to which they did not assent. At the end of December the plaintiffs ordered the ship to go to Mumbles Roads for orders. The defendant refused to comply with the order on the ground that the strike had frustrated the commercial object of the adventure. The plaintiffs claimed damages for breach of contract:—

Held, that the strike provisions in the charter contemplated an interruption of work due to a local withdrawal of labour and not the total impossibility of any export of coal for upwards of eight months; that the change of circumstances prevented performance of the charter according to its true intent, and that the action failed.

Breach of Charterparty.

The plaintiffs were Cleeves Western Valleys Anthracite Collieries, Ld., and Luigi Monge, an Italian coal importer. The defendants were "the owners of the Greek steamship *Penelope*," but it appeared that the sole owner was one Spiridion Paramythiotis, who was also the master. By a charterparty entered into on March 24, 1926, between the plaintiffs and the defendant it was agreed that the *Penelope*, "expected ready to load between May 20 and June 20 next, steamer giving charterers fourteen days' notice of readiness to load the first cargo," should proceed to one of various named Bristol Channel ports and there load "from the charterers, in such dock as may be ordered by them on or

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before arrival in —— Roads a full and complete cargo of coals and/or fuel " for carriage to one of several Mediterranean ports. By clause 15 the charter was " to be in force for twelve months as and from date of notice of readiness to load for first voyage. Steamer to run consecutive voyages, that is, out with cargo returning in ballast and to make as many voyages as she can over the said period."

Clause 3 provided that in the event of any stoppage arising from various causes [which included " strikes, lockouts, or any dispute between masters and men occasioning a stoppage of pitmen, trimmers, or other hands connected with the working or delivery of the coal for which the vessel is stemmed "] continuing for the period of six running days from the time of the vessel being ready to load, the charter should, provided that no cargo had been shipped on board the vessel previous to such stoppage, become null and void. If the vessel was already on demurrage at the commencement of the stoppage and the stoppage extended to not less than 75 per cent. of the collieries in South Wales the charterers might give notice that they were prepared to cancel the charter, and on receipt of such notice the vessel might either sail or the owners might give notice of their intention that the vessel should remain until the termination of the stoppage, when the lay hours would commence on the day on which the collieries restarted work. Clause 16, which was added to the printed clauses, was in the following terms : " Steamer not to be ordered to any loading port at which there is a strike in force. Steamer to be free to interpose a substantially similar voyage if charterers unable forthwith to order steamer to another loading port stipulated in charter free of strike."

On May 1, 1926, the general coal strike broke out, and no coal could be exported from any of the South Wales pits until the latter half of December, 1926. At the end of May, 1926, the defendant's brokers directed the plaintiffs' agents that notice of readiness to load was to be given to the plaintiffs. The plaintiffs replied that owing to the strike they could not order the vessel to a port to load, and the parties agreed that she should make two voyages, Tunis—London—Swansea

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and Stettin—Manchester, as though they were voyages within the terms of the charter. In November the plaintiffs protested against a Montreal—Huelva—Rouen voyage which the ship was making, and at the end of December they ordered her to Mumbles Roads for orders. The defendant declined to comply with these instructions. The plaintiffs claimed damages for breach of contract.

Langton K.C. and *Sir Robert Aske* for the plaintiffs. Unless performance of the contract is impossible (*Taylor* v. *Caldwell* (1)) a very strong case must be made out before the Courts will hold that an adventure has been frustrated by mere delay: see, e.g., *Jackson* v. *Union Marine Insurance Co.* (2); and the Courts are particularly slow in recognizing strikes as a possible cause of frustration. "Strikes have always been treated by the Courts as subject to such unexpected termination that they cannot without more be treated as abrogating contracts" (per Scrutton L.J. in *Metropolitan Water Board* v. *Dick, Kerr & Co.* (3), a decision affirmed by the House of Lords (4)): see also *Braemount Steamship Co.* v. *Andrew Weir & Co.* (5) and *Ropner & Co.* v. *Ronnebeck.* (6) The furthest the Courts have ever gone as regards applying the principle of frustration of the adventure to a time charter was in *Bank Line, Ld.* v. *Arthur Capel & Co.* (7), but in that case the House of Lords held on the facts that the requisition of the vessel by the Government was of such a character as to destroy the identity of the chartered service. It is a question of fact in each case, and the *Bank Line* case (7) can be compared with the *Metropolitan Water Board* case (4) and with *F. A. Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (8), where the charter-party had nearly three years to run, but the House of Lords nevertheless held that the requisition did not determine the contract. The case most similar on the facts is *Larrinaga &*

(1) (1863) 3 B. & S. 826.
(2) (1874) L. R. 10 C. P. 125.
(3) [1917] 2 K. B. 1, 35.
(4) [1918] A. C. 119.
(5) (1910) 15 Com. Cas. 101.
(6) (1914) 20 Com. Cas. 95.
(7) [1919] A. C. 435.
(8) [1916] 2 A. C. 397.

Co. v. *Société Franco-Americaine des Phosphates de Medulla, Paris* (1), where it was held that the abandonment of the first three voyages out of six agreed to be performed under the charter did not affect the right of the charterers to claim performance of the last three voyages. Further, strikes were in the contemplation of the parties; they provided for them in the charterparty; and were in touch with each other throughout the period of delay up to the time when the defendant repudiated the contract. The plaintiffs agreed to interposed voyages, and the defendant cannot thereafter allege that the whole adventure was frustrated; by his conduct he kept the contract alive: see *Hartley* v. *Hymans* (2) and the observations of Swinfen Eady L.J. in *Modern Transport Co.* v. *Duneric Steamship Co.* (3) The twelve months under the charter should be taken to have commenced to run on June 12, the date when the *Penelope* could have arrived in the Bristol Channel and would have been ready to load.

[Reference was also made to *Paradine* v. *Jane* (4), and, by the Court, to *The Moorcock.* (5)]

Dunlop K.C. and *H. O'Hagan* for the defendant. The charterparty could not begin to run until the charterers had nominated a port, and, under clause 16, a port where there was no strike in force. The nomination of a port was a condition precedent, and the plaintiffs did not and could not nominate a port until after the lapse of some eight months. No "notional" date, therefore, can be taken from which the twelve months can be held to have commenced to run. The parties, however, never had in contemplation strikes of the character of the general coal strike of 1926, and the provisions as to strikes were not inserted in order to deal with exceptional events of that nature. Under clause 3, if applicable, the defendant could have treated the charter as null and void at once. The mere fact that there are provisions dealing with delay does not preclude the Court from

(1) (1923) 29 Com. Cas. 1.
(2) [1920] 3 K. B. 475, 492.
(3) [1917] 1 K. B. 370, 379.
(4) (1647) Aleyn, 26.
(5) (1889) 14 P. D. 64.

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saying that the particular delay was of such a character that it could not be within the contemplation of the parties, and that it entirely frustrated the adventure: see the observations of Lord Finlay in the *Bank Line* case (1), of Lord Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Co.* (2), and of Bankes L.J. in *Scottish Navigation Co.* v. *W. A. Souter & Co.* (3) On the facts the present case is a stronger one for the application of the doctrine of frustration than the *Bank Line* case. (1)

[THE PRESIDENT. May not the defendant have committed a breach of the charterparty at a date before the adventure could be said to have been frustrated ?]

The shipowner has a right at common law to use his vessel during a strike. In making other voyages he was merely exercising that right, and as long as his ship was back before the strike was over there was no breach of contract. He had given notice of expected readiness to load, and the plaintiffs had confessed their inability to perform their obligation as regards naming a port. In the *Larrinaga* case (4), relied on by the plaintiffs, the charter was in respect of six ships and six voyages, and obviously an inability to perform the earlier voyages would not have the effect of frustrating the adventure qua the later voyages, which were entirely separate and distinct. Where one ship only is concerned different considerations apply: see, e.g., *Ambatielos* v. *Grace Brothers & Co.* (5), where it was held that the cancellation of one voyage out of four frustrated the whole adventure. The charter for the *Penelope* was a single contract for a number of voyages expected to last twelve months, and if the plaintiffs' contentions are right the shipowner would only receive at most six months freight.

As regards estoppel, before that doctrine can be successfully invoked the plaintiffs must prove a representation of existing fact, not representations as to the future as to which both parties had equal knowledge: see *Jorden* v. *Money* (6);

(1) [1919] A. C. 435, 442.
(2) [1926] A. C. 497, 509.
(3) [1917] 1 K. B. 222, 246.
(4) 29 Com. Cas. 1.
(5) (1922) 13 Ll. L. Rep. 227.
(6) (1854) 5 H. L. C. 185.

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Maddison v. *Alderson* (1); and *George Whitechurch, Ld.* v. *Cavanagh*. (2)

[Reference was also made to *Ollive* v. *Booker* (3); *Behn* v. *Burness* (4); and *Charles Le Borgne & Co.* v. *E. Johnson & Co.* (5)]

Aske in reply. There was no obligation on the plaintiffs to name a port until such time as the ship would not be delayed. Before the end of December coal could be shipped from the Welsh ports, and on December 29 the defendant repudiated the contract. The express terms of the charter exclude the suggestion that there was an implied term that a prolonged strike should determine the contract.

[Reference was made to *Akties Nord-Osterso Rederiet* v. *Casper Edgar & Co.* (6); and *Rederei Kirchner & Co.* v. *Hugo Stinnes*. (7)]

Cur. adv. vult.

May 11. THE PRESIDENT (LORD MERRIVALE) read the following judgment: The plaintiffs, a joint stock company having offices in South Wales and an Italian coal importer, Signor Monge, are jointly interested in coal exports from the Bristol Channel ports to Italy. The defendants are sued as owners of a Greek steamship, the *Penelope*, and, so far as appears on the evidence, Spiridion Paramythiotis, who was a witness in the case, is the owner. In this judgment he is described as the defendant. The plaintiffs bring their action to recover damages for breach of contract under a charter of the *Penelope* made in March, 1926. By the charterparty it was agreed that during twelve months from a date to be fixed, between May 20, 1926, and June 20, 1926, the ship should be employed in carrying successive cargoes of coal from one of the South Wales ports to one or other of the specified Italian or Sicilian ports.

The differences between the parties arose by reason of the interruption of industry in May, 1926, known as the general

(1) (1883) 8 App. Cas. 467.
(2) [1902] A. C. 117.
(3) (1847) 1 Ex. 416.
(4) (1863) 32 L. J. (Q. B.) 204.
(5) (1920) 3 Ll. L. Rep. 109.
(6) (1923) 14 Ll. L. Rep. 203.
(7) (1924) 18 Ll. L. Rep. 417.

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strike, and the prolonged cessation of work in the collieries of the Kingdom during 1926, known as the coal strike. The plaintiffs allege that in December, 1926, when performance of the agreement was practicable, it was wrongfully refused by the defendants, to the loss of the plaintiffs. The defendants, by their defence, allege that by reason of the coal strike " the commercial venture provided for by the charterparty was wholly destroyed and/or its identity wholly altered," and that this contract between the parties thereby became null and void.

By the pleadings a question is raised with regard to an accidental stranding of the *Penelope* in the course of a voyage from Huelva to Rouen. It was little discussed during the hearing, and I may dismiss it as a suggested material element in the case by stating, as I find to have been the fact, that the stranding took place without default of the defendant, and that the questions on which the plaintiffs' action and the defendant's answer depend do not, in my opinion, turn upon any matter connected with or arising from the stranding or consequent detention at Rouen of the vessel.

The main issue at the hearing was whether the contract was put an end to by the coal strike, and counsel dealt with this matter on the footing of the principles of law which are illustrated in numerous cases in the House of Lords, mostly brought about by events of the great war, in which there was discussed the frustration of contracts by unforeseen causes preventing their performance. This case is, however, complicated by the admitted fact that serious labour difficulties were foreseen when the charter was made, and that it contains a clause relating to possible strikes. Moreover, for a considerable time after performance of the charter was due, and the coal strike prevented it, each party anticipated that the *Penelope* might sooner or later carry coal for the plaintiffs on the terms of the charter, and acted on this supposition. There is a further complication by reason of disputes as to the authority by which the brokers who negotiated the charter gave information and made representations of various kinds during a period of many months

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after the charterparty had been signed and while it was impossible of fulfilment. The brokers had interests of their own in the matter, inasmuch as their remuneration for the negotiation of the contract was a commission on profits earned thereunder. The plaintiffs instructed Messrs. Petters & Co. of Cardiff from time to time as to steps they should take with regard to the matter in dispute. The defendant was not shown to have given to any one any general authority to act for him, and, except where his own letters show it, I think he did not.

Before attempting to apply to the case the legal principles which are invoked by the parties it is essential to appreciate the terms of the contract, the situation which supervened upon it, and is said to have caused frustration, and the effect from time to time of the conduct of the parties, not only upon their original rights and duties, but upon their obligations as changed, if they were changed, by the various occurrences in the course of their mutual dealings. Under the charterparty the owners were to take the first step. They were to give to the charterers fourteen days' notice of expected readiness to load a cargo at one of the specified ports. Next, the charterers were to specify a port. Then the vessel was to be brought to Roads. Mr. Petters of Swansea took upon himself, without authority, to write into the contract a word which was to require the bringing of this ship into Mumbles Roads, but that does not affect the respective obligations of the parties, and has not added, as it might have done, to the necessary complications of the case. To the vessel on or before her arrival in the Roads the charterers were therefore to specify a dock at the specified Bristol Channel port to which they required the vessel to proceed. There the charterers were to produce, and the vessel was to receive, cargo of the agreed quantity and character. Such cargo the vessel was to convey to the specified Mediterranean port and there deliver to the consignees. Liability of the charterers for demurrage is prescribed and limited by the charter, and there are protective exceptions in favour of the charterers in special events arising in normal cases.

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Strikes of workmen during loading is one of the contemplated possibilities, and there are provisions that if a stoppage from a specified cause shall continue for six running days after the vessel is ready to load, or commences then and continues for that period, then, provided no cargo shall have been shipped, the charter shall become null and void. There is also an option to the charterers in some cases of the same class to give to the owners the option of cancelling the charter, and in case they do not exercise their option the contract leaves the charterers free to determine the charter upon payment of accrued demurrage.

The charter was not a mere time charter. It was expressed: "To be in force for twelve months as and from notice of readiness to load for the first voyage, the steamer to run consecutive voyages, that is out with cargo, returning in ballast, and to make as many voyages as she can over the said period." Added to the common form clauses and the provisions contained in the clause last cited were the terms—now of special importance—inserted by the parties to meet labour difficulties. These are worded as follows: "Steamer not to be ordered to any loading port at which there is a strike in force. Steamer to be free to interpose a substantially similar voyage if charterers unable forthwith to order steamer to another loading port stipulated in charter and free of strike." It is necessary to observe and bear in mind which of the parties had the veto and the initiative under the two parts of this clause.

On the question of agency which arose at the hearing, I have come to the conclusion that Messrs. Petters & Co. were not the defendant's agents to alter the charter by inserting the word "Mumbles" and that the defendant did not ratify the alteration; that Messrs. Petters & Co. had no authority at any time after it had been executed to vary the terms of the charter; and that in the instances where they and the London brokers, Messrs. Stavroudis, differ to some extent in their version of the transactions in question the account of Messrs. Stavroudis should be accepted. Messrs. Stavroudis, as defendant's brokers, kept him informed

of facts material to be known by him, and had authority to inform the plaintiffs, through Messrs. Petters or directly, of the various matters of which they from time to time informed them, and on his behalf to require specific action under the charterparty which they from time to time required, but no authority to agree upon any variation of the terms of the charterparty. Such variation as in fact occurred is that resulting from conduct, and not from express bargain. The charters for the steamer made after the conclusion of the contract between the parties in March, 1926, were made on the direct instructions of the defendant, and he gave no general authority to a broker to conclude charters.

Having disposed of some preliminaries I proceed to state the course of events under the contract.

The charter having been signed on March 26, 1926, the outlook as to labour troubles became progressively worse. On May 1 the coal strike began, and involved an universal stoppage of work in the mines from which coal for the loading of the *Penelope* was to be obtained. On May 1 Stavroudis wrote to Petters for the information of the plaintiffs that the ship would proceed to the Mediterranean, and would return to Swansea in ballast "provided, of course, the strike is settled"; that the notice of readiness stipulated for in the charterparty would be formally handed to the charterers in due course; and that the vessel would be ready in Swansea, "assuming the strike is ended," about the first week in June. After later correspondence to the same effect they at the end of May directed Petters to inquire of the charterers to what port they wished the *Penelope* to proceed, impressing on them at the same time the owner's rights under the special clauses of the charter. They directed notice of readiness to load to be given to the charterers, and emphasized as strongly as possible the fact that the charter required of them action which would bind them to load in due course, or to take the agreed consequences. They were entitled to expect an equally definite answer, but they did not get it. The substance of what was said was, "Until the strike is settled we cannot give you any information or orders." The plaintiff

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company, however, wrote to Signor Monge in Italy: "We fear they can insist upon our making a declaration." They apparently entertained at the same time an unwarranted notion that the charterers would be entitled to treat the charter as running for twelve months, not from her first notified readiness to load but "from the date when the charterers are first able to load." Stavroudis insisted on the owners' rights, and on June 12 the plaintiffs wrote that they could not order the vessel to a port to load, and must "leave the owners to make their own arrangements." No orders being given, a substituted charter was arranged. In course of the substituted voyage, Tunis—London—Swansea, the defendant arrived in Swansea—he had by this time taken command of the *Penelope*—and he then saw the representatives of the plaintiff company. Stavroudis had suggested, through Petters, that instead of voyages which defendant could make of right there should be, without prejudice to the charter, an agreement for interposing a voyage to the United States. That substituted voyages such as the defendant was entitled at his choice to make could only be made with difficulty appears clearly on the evidence. Paramythiotis discussed the situation with the plaintiffs. They declared their inability to order the ship to a dock for loading; they rejected the suggestion of agreement upon a United States voyage; they dissented from a suggested chartering from Rotterdam. The defendant, left to his own resources, chartered the vessel for a voyage from Stettin to Manchester. This was a second voyage treated by consent of the parties as an interposed voyage under the special clause in the charter. During the discussions at Swansea a suggestion was made that the charter should be converted into a forward contract for voyages to be made during a period of twelve months to date from a time at which the defendant should be able to tender the ship for loading after the termination of the strike. The correspondence and the oral testimony create uncertainties as to the origin of this idea, and as to the extent to which the parties respectively then appreciated their relative positions. This is immaterial,

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however, as Signor Monge said that he preferred to "leave things as they are," and nothing of the kind was agreed.

A critical period in the case was reached when the *Penelope* arrived at Manchester on the second substituted voyage. The defendant, with apparent appreciation of his rights, called for orders from the plaintiffs. They replied on September 9 through Petters: "We cannot give any instructions." Nearly three months had now elapsed since the defendant originally tendered the vessel to the plaintiffs. According to the evidence on both sides one-fourth of the series of voyages by which the defendant was to earn freights from the plaintiffs had been forgone. The coal strike showed no signs of probable early settlement. In this condition of affairs the defendant resolved upon independent action. Stavroudis wrote him on September 9 that he was entirely free to "interpolate another voyage as stipulated in your charter." He elected not to do so. Disregarding the objection of the plaintiffs in their conversation with him at Swansea he accepted an offer received by him through Stavroudis of a charter from a Dutch port to Montreal and thence to Naples. Petters knew of this in due course. The plaintiffs were only directly informed later. The defendant's account of his reasons for accepting a charter in breach of the plaintiffs' charterparty was this: "Till I was at Manchester I had my mind for the strike to finish and then to deliver the ship to Cleeves. After Manchester as the strike was going on so long I thought the charter was void and chartered the ship for America. . . . . I avoided short voyages and chartered for America."

The case would have been free of some of its perplexities if the defendant had explicitly told the plaintiffs what he was doing and intending to do. He made personally no communication to them. I do not find that he directed that any express statement as to the future should be made to them. He took his independent course, and left the plaintiffs to learn of it through the brokers or the published lists of ships' movements. Stavroudis kept the plaintiffs informed through Petters. They notified the making by the

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defendant of a new charter for a voyage of the *Penelope* from Montreal to Huelva, and thence to Rouen, and they wrote on the subject of this voyage to the effect that from Rouen "if the strike is over she will of course proceed to Swansea." I see no reason for believing that the defendant authorized any promise to this effect, though he no doubt intended to make some offer to the plaintiffs at a convenient time if circumstances should admit of it.

When the plaintiffs became aware of the intended Montreal voyage they complained to Stavroudis. When they were informed through Petters of the Naples—Huelva—Rouen voyage they stated their position, threatened a claim for damages if the strike should end before this voyage was complete, and said: "The owners should be prepared to give us the steamship within a reasonable time after the settlement of the strike." On what footing it was supposed that the *Penelope* must be, or could be, kept at call for the plaintiffs in this way I do not understand.

The claim provisionally notified by the plaintiffs to the brokers was put forward by Petters to the defendant by a letter of November 29, 1926, which reached him at the beginning of December, and he thereupon set up to and through Stavroudis his contention that the charter of March was at an end.

It is material to realize the state of things which existed in December, when the parties respectively took conclusive action. The coal strike had become restricted in its operation during November. After it was at an end the governmental embargo upon coal export remained operative. It had been in force while the strike was in progress, and it was a means of frustration probably identifiable under clause 3 of the charterparty and certainly effectual to prevent any utilization of the charter. The embargo continued until December 17. A week earlier the plaintiffs purport by a letter written by them to Petters & Co. to have arranged for another ship for loading on December 10. The plaintiffs' manager, however, said in the witness box that Messrs. Cleeves had no loading instructions, and at the end of the month when they directed

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Petters & Co. to "order (the *Penelope*) to the Mumbles for orders" they added: "We cannot yet give you a dock or port as we are awaiting instructions." On the day of their so writing Signor Monge had telegraphed to them: "Impossible to load her for my account. Charter her elsewhere." It was while this singular state of affairs existed that on December 31 Messrs. Stavroudis wrote to the plaintiffs that "owing to the strike the commercial object of this charter which contemplated loading approximately in the month of May was frustrated." Laborious efforts made by the brokers in January and February to bring the matters to some amicable settlement were without success, and on March 4—after the period of accidental disablement due to the grounding of the *Penelope* was at an end—the plaintiffs issued their writ.

The difficulty of the case seems to me to arise rather from uncertainty due to the action of the parties—and of the respective brokers—at the successive stages of their relationship, than from any ambiguity in the law. The discussions in the House of Lords upon the variety of contests which arose during the great war out of contracts frustrated by the incidents of the war did not, as I think, create new law. They illustrated and emphasized familiar principles of the common law. The judgment delivered in *Taylor* v. *Caldwell* (1) by Lord Blackburn (then Blackburn J.) formulates them: "There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible. . . . . But . . . . where from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be

(1) 3 B. & S. 826, 833.

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done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

At an intermediate period between the decision of *Taylor* v. *Caldwell* (1) and the litigation which arose from the frustration of contracts by the War the principles stated by Lord Blackburn in *Taylor* v. *Caldwell* (1) had been considered and applied in a series of cases which arose from the postponement of the Coronation of King Edward VII.: *Krell* v. *Henry* (2); *Herne Bay Steamboat Co.* v. *Hutton* (3); *Elliott* v. *Crutchley.* (4) In the course of this litigation it was made clear that the principle which applies where there is "cessation of the existence of the thing which is the subject-matter of the contract" applies also where there is "cessation or non-existence of an express condition or state of things going to the root of the contract." This was reaffirmed in the House of Lords in *Horlock* v. *Beal* (5), one of the frustration cases during the great war which were principally discussed in the argument in the present case.

Whether the "doctrine of frustration" is applicable to a time charter, or to the charter here in question, and whether the presence in this charter of express terms with regard to strikes or a strike operates to prevent the application of any implied conditions, were outstanding topics in the discussion. For my own part I find it difficult to conceive a contract which shall be free from implications, but it may be that by the use of apt words in the document contracting parties could make their agreement proof against implication. Moreover this charter is not a time charter within the common meaning of the term. It is a charter for a series of voyages with limits of time as to commencement and continuance. I may add that *Tamplin Steamship Co.* v. *Anglo-Mexican*

(1) 3 B. & S. 826.
(2) [1903] 2 K. B. 740.
(3) [1903] 2 K. B. 683.
(4) [1906] A. C. 7.
(5) [1916] 1 A. C. 486, 513.

Petroleum Products Co. (1) was a case of a time charter and a condition in respect of frustration was implied.

The presence of an express provision in favour of the owners giving them an option to accept substituted employment in certain specified circumstances, though it is an important fact, does not of itself determine that the contract may not be frustrated by the inability of the charterers to employ the ship. Suppose, for example, on the first failure of the charterers to nominate a port and dock at which they would undertake to load, that no employment was obtainable by the owners. It could hardly be suggested in that event the owner had bound himself to have the ship ready for the charterers at some undetermined and indeterminable time when they might be ready. In *Bank Line, Ld.* v. *Capel & Co.* (2) there was a provision as to requisitioning by the Crown, but it was held not to exclude implications as to frustration when the vessel was requisitioned. Some implication must certainly be made in the present case. Otherwise the plaintiffs by their default in ordering the *Penelope* to a dock were liable in damages for breach of contract in June, 1926, and again on each subsequent occasion when the ship was tendered and they declared they could not load her. The real difficulty in the case seems to me to be to find the implied condition or conditions by which the express terms of the charter are controlled. To adapt some words from the opinion of Lord Parker of Waddington in the case of the *Tamplin Steamship Co.* (3): What condition is to be implied ? Can you frame such a condition as the implied condition to be relied upon without contradicting the express provisions of the contract and defeating the intention those provisions disclose ?

It was argued for the plaintiffs that inasmuch as strikes are not only repeatedly mentioned in the charterparty, but are matter of common occurrence, a strike of any nature or extent must be taken to be within the contemplation of the parties. I do not find myself able, though, to say that the

(1) [1916] 2 A. C. 397. (2) [1919] A. C. 435, 458.
(3) [1916] 2 A. C. 397, 427.

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coal strike of 1926 might not be an unforeseen event in the sense which involves frustration. Sickness is an every day affair; but a contract for personal service may become null and void by reason of a physical or mental disability of the obligee which frustrates the object of the engagement: *Robinson* v. *Davison* (1); *Storey* v. *Fulham Steel Works Co.* (2); *Poussard* v. *Spiers & Pond.* (3) The facts must be examined to determine whether, apart from the agreement of the parties after the occurrence, the coal strike was an event which frustrated the object of this contract. This being ascertained it will be proper to see what agreements, if any, were made during the strike, and how they affect the contract and the rights of the parties thereunder.

The defendant agreed to employ his ship for twelve months in carrying coal to the Italian ports for the charterers. Of such voyages, conducted on the terms of the charterparty, he could reckon upon completing eight. About six weeks per voyage and eight voyages at most was the estimation of the plaintiffs' witness, Mr. Ellis. Overhead expenses, running expenses, whatever return was to be had from the use of the vessel, are included in the earnings of this series of voyages. They were to extend from June to June. A series occupying six or eight months would be quite another affair. So would a series of six voyages running from December to June. So far as I can see neither party was entitled without agreement on the part of the other to require substitution for the agreed series of any other series, or any less series. Cancellation of voyages, except by agreement, would in my opinion wholly and fundamentally change the conditions of the contract, and, to quote the words of Lord Dunedin in *Metropolitan Water Board* v. *Dick, Kerr & Co.* (4), "would make the contract when resumed a really different contract from the contract when broken off."

It was persuasively argued before me that as the coal strike was not unforeseen the principles expressed in the cases on frustration could not apply. What was unforeseen,

(1) (1871) L. R. 6 Ex. 269.
(2) (1907) 24 Times L. R. 89.
(3) (1876) 1 Q. B. D. 410.
(4) [1918] A. C. 119, 130.

however, was the total impossibility of any export of coal from the South Wales ports for a period of half a year and upwards. Was this a delay contemplated by the parties? I take into consideration what was said by Viscount Sumner in *Bank Line, Ld.* v. *Capel & Co.* (1): "Delay even of considerable length and of wholly uncertain duration is an incident of maritime adventure, which is clearly within the contemplation of the parties, such as delay caused by ice or neaping. . . . . Delays such as these may very seriously affect the commercial objects of the adventure. . . . . None the less this is not frustration; the delay is ordinary in character." The kind of interference which the parties in this case contemplated is that dealt with in the printed provisions of the charterparty and in the added clauses—an interruption of work by a local withdrawal of labour. Such an interruption is a trivial occurrence compared with the events in question; as to this actual event the plaintiffs' witness, Mr. Ellis, said: "No prudent man could have foreseen the state of things which arose." On the whole I come to this conclusion, that there was an unforeseen compulsory change of circumstances not contemplated by the parties, and that as soon as it manifestly prevented performance of the charter according to its true intent, "the time had arrived at which the fate of the contract falls to be decided": per Lord Sumner in *Bank Line, Ld.* v. *Capel.* (1)

What then was the effect upon the contract contained in this charterparty of the conduct of the parties? After considering the correspondence and the evidence of the witnesses, I find that the parties impliedly agreed that the voyage Tunis—London—Swansea, and later the Stettin—Manchester voyage should be made as though they were voyages within the provisions of s. 16 of the charterparty. They made no subsequent agreement. When the defendant was at Swansea in August the plaintiffs declared themselves unable to fulfil their obligations to name a port for loading, and he took his own course by accepting the Montreal charter. Afterwards he determined without any consent of the

(1) [1919] A. C. 435, 458, 459.

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charterers to make his Huelva—Rouen voyage. Probably he reckoned upon the plaintiffs' knowledge of these fixtures. In due course he learned that they did not consent to them. He did not ask their consent, or make any bargain about it. He intended, as he stated in the witness box, to offer them the vessel at a reasonable period after the end of the strike. No doubt he thought that he and the plaintiffs might agree upon some voyages on the terms on which the *Penelope* was to have been employed under the charterparty. There was, however, no bargain made to this effect. Each party from time to time made suggestions which the other would not accept. I find that the charterparty as varied by the understanding which was arrived at, first as to one, and then as to another substituted voyage, was not further varied or prolonged; that when the defendant refused to satisfy the demands of the plaintiffs in and after November, 1926, rightfully refused; that the plaintiffs made no demand in this later period with which the defendant was bound to comply; and that when he declared through Messrs. Stavroudis that the contract was at an end he was entitled so to do. Using the words "ready and willing" in the sense in which they are properly used in matters of contract the plaintiffs were not ready and willing to perform the obligations of the charterparty at the material times to which the dispute relates.

The action fails, and must be dismissed with costs.

Solicitors for the plaintiffs: *Botterell & Roche, for Vaughan & Roche, Cardiff.*

Solicitors for the defendants: *Holman, Fenwick & Willan.*

E. C. M. T.

ADMIRALTY.

1928
June 12.

THE HARKAWAY.

Shipping—Damage—Breach of Duty—Negligence—Anchor in shallow River—Duty to buoy or warn.

The defendants' sailing barge came to anchor in the River Medina, Isle of Wight. She was lying on the mud anchored with fifteen fathoms of chain leading from her bows on to the mud and thence to the anchor lying in the channel, which at low water is a mere gut-way 30 feet wide. The plaintiffs' motor boat, drawing 5 feet 3 inches aft and with about one foot of water under her, coming up the river in the deepest water there was at the time, went over one of the flukes of the anchor projecting up out of the mud at the bottom of the river and was holed and sank:—

Held, that having regard to the shallowness of the water the anchor ought to have been buoyed or some other warning given of its position, and that the defendants were liable to the plaintiffs for the damage sustained.

Clarke v. *Scattergood* (1663) Marsden's Adm. Cas. 243 followed.

ACTION OF DAMAGE.

The plaintiffs, the owners of the motor vessel *Harkaway*, claimed to have suffered damage through the negligence and/or breach of duty of the defendants, the Associated Portland Cement Manufacturers, Ld., in and about the navigation and/or management of their sailing barge *Louisa*, in the River Medina, Isle of Wight.

About 7 P.M. on April 1, 1927, the *Harkaway* was bound up the river from Cowes to Newport with a general cargo. The tide was flood of the force of about one knot and the *Harkaway* was making a speed of about three miles an hour. The *Louisa* was lying head down river and angled out, high and dry on the mud on the east bank of the river. She was made fast by a rope from her starboard quarter to a tree on the bank and had a 3½ cwt. anchor and fifteen fathoms of chain leading from forward right ahead of her. It was not yet dark, but the crew had put up an anchor light before going ashore, leaving no one on board her. As the *Harkaway* was passing the *Louisa* she came in contact with one of the flukes of the anchor, which was projecting up out of the mud, and sustained so much damage that she at once settled on the bed of the river and the rising tide gradually submerged her.

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Dumas for the plaintiffs. The defendants had no right to put out an anchor, which, on account of the shallowness of the water, constituted an obstruction in a public navigable highway. In *Jolliffe* v. *Wallasey Local Board* (1) Denman J. said: "If the defendants had no statutory authority to place the anchor where they did, I should have been disposed to think that the injury sustained by the plaintiffs in this case was an actionable injury." See also the observations of Lord Ellenborough in *Harmond* v. *Pearson* (2) as to its being "a peremptory law of navigation" to place a buoy over any substance sunk in a navigable river. If it was necessary to put out an anchor at all it should have been buoyed or some one should have been left on board the barge to give warning. In the old days of shallow drafted craft ships with unbuoyed anchors were "invariably found in fault": see Marsden's Collisions at Sea, 8th ed., p. 101.

Alfred T. Bucknill and *H. C. Willis* for the defendants. The defendants were not guilty of any negligence or breach of duty. They were entitled to anchor their barge in a public river: see *Attorney-General* v. *Wright* (3); and Coulson's Law of Waters, 4th ed., p. 453. The plaintiffs could see the anchor chain, would know what was a reasonable scope of chain to have out, and approximately, therefore, where the anchor would be. The *Harkaway* was proceeding up on the eastern side of the channel instead of keeping to her own starboard side of it, the western, as she ought to have done, and the accident happened because she was trying to come up when there was not enough water under her for her to do so in safety. *Harmond* v. *Pearson* (2) is not an authority in the plaintiffs' favour; the "sunken substance" in that case was a lighter, an abnormal thing not to be expected, and obviously a thing the position of which must be indicated. In an American case, *Baxter* v. *International Contracting Co.* (4), it was held that no buoys are necessary in an ordinary anchorage ground. By s. 41 of the River Medina Navigation Act, 1852 (15 Vict. c. xxi.), the council of the borough of

(1) (1873) L. R. 9 C. P. 62, 88.
(2) (1808) 1 Camp. 515.
(3) [1897] 2 Q. B. 318.
(4) (1894) 65 Fed. Rep. 260.

Newport have power to make by-laws "for governing and regulating the anchorage of all vessels in the said river, and for preventing all nuisances in such river, and obstructions to the navigation thereof"; but it has never been thought necessary to pass a by-law that anchors must be buoyed.

There is a very old case, *Clarke* v. *Scattergood* (1), decided in 1663, where a sentence of the judges delegates reversed a sentence of the Admiralty Court in a suit by the owners of the sailing vessel *Warewell* against the owners of the sailing vessel *Susan* to recover damages for injury to the *Warewell* by the anchor of the *Susan* which was unbuoyed, and upon which the *Warewell* grounded in the Thames. The High Court of Admiralty had held that the defendants were not to blame, and the decision shows that at any rate it could not have been usual to buoy, for that Court would have more experience as to the practice of seamen in the navigation of the River Thames at that time than the judges delegates. The plaintiffs do not suggest that the anchor should be marked by a lighted buoy, but unless lighted, at night time a buoy would be useless; the plaintiffs' argument therefore cannot be sound. According to the evidence it is not the practice to buoy, and the buoys would be very liable to be cut adrift by the motor boats. Further, it would entail considerable expense to be compelled to buoy all anchors, or, on the other hand, to have to keep an anchor watch.

Dumas replied.

BATESON J. I have no doubt the plaintiffs are entitled to recover the amount of the damage they have sustained. The *Harkaway*, a wooden vessel belonging to the plaintiffs, of 27 tons gross, 53 feet 1 inch long, with a beam of 16 feet 5 inches and fitted with engines of 35 B.H.P., was coming up river in the course of a voyage from Cowes to Newport, Isle of Wight. She had some general cargo and a crew of three hands. It was a fine evening and there was not any wind. The tide was what is called a "lay tide," which means that the water was swelling in the river, and this motor boat

(1) Marsden's Adm. Cas. 243.

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was proceeding up on the swelling water. She was drawing 5 feet 3 inches aft and 4 feet 3 inches forward, and she had about a foot of water under her as she was going up river. The master was taking her up in the best water; he could not get further than a little above the West Medina Cement Works, because he would not have had enough water.

As the master of the *Harkaway* was going up he saw the *Louisa* ashore on the mud on his port bow. The River Medina at this place is, at low water, a mere gut-way of about 30 feet wide, but when the tide rises to high water there is a considerable amount of water extending to some 200 feet on one side of the middle line of the gut-way and 100 feet on the other side. The master of the *Harkaway* was going up using the lay tide for his boat, when suddenly he found her bumping over what turned out to be the anchor of the *Louisa*, as to which he had no warning of any sort except that there was a chain hanging out from the bow of the *Louisa* on to the mud and then presumably going on some distance. It might be ten or fifteen fathoms; it might be more or it might be less. It might have been in one direction following the hawse pipe along the mud and in a different direction under the water; and unless there was some indication the master would not know where the anchor was. At any rate, he would not expect to find it in the best water in which he had to navigate. This anchor was sticking up out of the bed of the river and formed an obstruction in the river, either on the edge of the gut-way or just within it, and in my opinion in the one place an anchor ought not to be in having regard to the position of the *Louisa*, and certainly in a position in which the master of the *Harkaway* would not expect it to be. Having bumped over it, and his vessel having sustained considerable damage, the master found, when the tide had ebbed, that this anchor was on his port quarter about eighteen inches behind him. His vessel was so injured that she sank.

As regards the *Louisa*, she was on the mud and had a rope tied to a tree from the stern, according to the mate, in order to keep her from floating on to her own anchor, so that evidently the possibility of her sitting on her own anchor was

present in his mind. Having thus secured her, the mate and the crew went away, and there was nobody on board the *Louisa* to warn persons coming up river as to the position of the anchor. The *Harkaway* gave the *Louisa* a perfectly proper berth, passing at a distance that her master thought was quite safe. The anchor may have been driven further into the river bed subsequently, but there is evidence to show that at the material time it was sufficiently projecting to catch the *Harkaway* in the shallow water. Under these circumstances, in my view, the case is really an undefended one.

In the olden days from 1663—and perhaps earlier—cases like the present were quite common where light draft vessels were navigating in shallow places and used anchors to keep themselves in position. It was laid down so far back as 1663, in *Clarke* v. *Scattergood* (1), that it was negligence to leave an anchor in a shallow navigable river without a buoy. I think that is good sense, and the decision has stood for nearly three hundred years. I have consulted the Elder Brethren and they also think it good seamanship, and that if people put down anchors in channels which are shallow at low tide they ought to be buoyed. It is said that if a buoy had been put down —a piece of wood or a tin can—the range of the buoy would have been 15 feet, but it would have been sufficient to give anybody warning, and no sort of warning was given in this case. It is also said that in this river buoys are not used because they get cut away by the motor boats, but that only means that they have not strong enough moorings; if stronger moorings were used, the motor boats would find possibly that their propellers were cut away instead of the mooring buoys. That, however, to my mind is no excuse for not buoying anchors, or if not, using some other means of warning people if anchors are put in such places as this. In my view a warning ought to have been given of this obstruction which the defendants' servants had no right to put in a public navigable river.

Mr. Dumas said his clients had a right to pass and repass in any navigable water without obstruction. Mr. Bucknill's

(1) Marsden's Adm. Cas. 243.

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reply was that his clients also had a right to put an anchor down. That is true, but they have no right to obstruct, and if they put such an anchor down they ought to give a warning. In the circumstances I think it was a trap, and a trap, unfortunately, that acted very successfully. Mr. Bucknill's case was that there was ample warning where the trap was. But the fact that you have a ship aground 90 feet from her anchor does not tell you where the anchor is or where it may be. How could the master obtain a knowledge of the actual place of the anchor from the position of the *Louisa*? If a person has an unbuoyed anchor that sticks up like a spike in the river and does damage I think he must pay. Mr. Bucknill pointed out that to have to buoy their anchors would put a serious burden upon the defendants. No doubt it would add a little to the care required by vessels, but the number of places in which it would be required is not great, the time during which there is any danger from an anchor is very limited, and the cost cannot be much to properly buoy an anchor of the type used in this case. It is said that no by-law has been made with regard to this matter. In my opinion no by-law is required; it is a case of common law negligence. Mr. Bucknill raised the question as to what is to happen at night time. Well, when that case arises I will consider it. My attention was called by Mr. Dumas to *Jolliffe* v. *Wallasey Local Board* (1); and to *Harmond* v. *Pearson* (2), in which Lord Ellenborough said: "It is a peremptory law of navigation, that when any substance is sunk in a navigable river, so as to create danger, a buoy shall be placed over it for the safety of the public. This is the proper and specific notice, which all understand and are bound to attend to." That seems to be good law, fairly applicable to this case, except that there the Court was dealing with a barge and here I am dealing with an anchor. But it seems to me that where an anchor, or the fluke of an anchor, sticks up out of the bottom of a channel it is perhaps more dangerous than a larger article like a barge; although it does not cover such a wide area it might do greater damage

(1) L. R. 9 C. P. 62. (2) 1 Camp. 515, 516.

from the sharpness of its point. Mr. Dumas also referred to Marsden's Collisions at Sea, 8th ed., p. 101, where it is stated that " before the days of floating docks, damage to ships by grounding upon unbuoyed anchors in the Thames and elsewhere was a very frequent cause of action. The ship whose anchor was unbuoyed was invariably found in fault "—and from the time of *The Susan* (*Clarke* v. *Scattergood*) (1) there are a series of similar cases in Admiralty from 1648 to 1840. Mr. Marsden goes on " and ordinances of the Admiralty—which appear to have been presentments of juries at Admiralty sessions—were issued against leaving anchors unbuoyed. In an American case it was held that in ordinary anchorage ground it is not necessary to buoy the anchor." That was *Baxter* v. *International Contracting Co.* (2), which Mr. Bucknill quoted to me. The learned judge, Brown J., said it was an occurrence which happened in an ordinary anchorage ground, and he appears to have thought it was a case of a shifted anchor and that the plaintiff had failed to make out his case, so that the decision does not help us very much here. Mr. Bucknill also referred to Coulson's Law of Waters, 4th ed., p. 453, with regard to rights in navigable waters and to *Attorney-General* v. *Wright.* (3) They deal only with the right to moor in navigable rivers, about which there is no question.

I think, in the circumstances, the plaintiffs are entitled to succeed. As to the amount, there must be judgment for the plaintiffs with a reference to the registrar.

Solicitors for the plaintiffs : *J. A. & H. E. Farnfield.*

Solicitors for the defendants : *Ince, Colt, Ince & Roscoe.*

(1) Marsden's Adm. Cas. 243. (2) 65 Fed. Rep. 260.
(3) [1897] 2 Q. B. 318.

E. C. M. T.

1928
June 6, 25.

DIVORCE.

H. *v.* H.

Divorce—Domicil—Desertion by Husband—Judicial Separation—Petition for Divorce by Wife—Acquisition of fresh Domicil by Husband—Form of Proceedings—Effect of Decree of Judicial Separation—Estoppel.

The competent jurisdiction to dissolve a marriage is that of the husband's domicil, and the defendant must be domiciled in that jurisdiction at the commencement of proceedings. Independent authority to dissolve the marriage cannot exist in two sovereign States simultaneously.

A husband by deserting his wife in one domicil does not become estopped from alleging another domicil after acquiring it, and the wife so deserted is not thereby entitled to determine the forum of her proceedings for dissolution. A decree of judicial separation by reason of a matrimonial offence of the husband does not as from its date fix matrimonial domicil or render it incapable of alteration without the consent of the wife.

A contested issue as to the governing domicil is not to be prejudged according to any presumption of law, but must be tried as a question of fact.

Armytage v. *Armytage* [1898] P. 178 and *Ogden* v. *Ogden* [1908] P. 46 commented on. The dicta there do not go beyond stating a practice of the Court, and are not supported by the principle of estoppel, which is a rule of evidence and not a bar to the jurisdiction.

Adjourned Summons.

The wife, petitioner, filed the present petition for dissolution of her marriage on January 4, 1928. On January 13, 1921, a decree of judicial separation had already been pronounced at her instance on the ground of desertion. A further previous petition filed by her for dissolution of the marriage had been dismissed by consent on October 7, 1921, on the petitioner receiving an allowance from the father of the respondent, and was not material in the present discussion. On March 1, 1928, the respondent husband appeared under protest to the present petition, alleging that he had not an English domicil, his case being that since September, 1923, his domicil had been French. On March 13, 1928, a registrar ordered that the question of the domicil of the husband should be set down for trial as a preliminary question of fact. On May 7, 1928, the petitioner took out the present (judge's)

summons to have the order of the registrar rescinded and calling on the respondent to show cause why his appearance under protest should not be disallowed. The judge in chambers (Lord Merrivale P.) adjourned the summons into Court for argument.

Clifford Mortimer for the petitioner. In consequence of his desertion the respondent is estopped from asserting a change of domicil: *Armytage* v. *Armytage*. (1) The material passage is as follows: "The Court does not now pronounce a decree of dissolution where the parties are not domiciled in this country, except in favour of a wife deserted by her husband, or whose husband has so conducted himself towards her that she is justified in living apart from him, and who, up to the time when she was deserted or began so to be, was domiciled with her husband in this country, in which case, without necessarily resorting to the American doctrine that in such circumstances a wife may acquire a domicil of her own in the country of the matrimonial home, it is considered that, in order to meet the injustice which might be done by compelling a wife to follow her husband from country to country, he cannot be allowed to assert for the purposes of the suit that he has ceased to be domiciled in this country." It is true that the passage relied on in the judgment in that case is merely a dictum, but the law has been administered on that footing ever since. Some doubt, however, appears to be expressed on the point in the judgment of the Privy Council in the case of *Attorney-General for Alberta* v. *Cook*. (2) The material passage is as follows: "The doubts expressed by Lord Cranworth and Lord Westbury—and indicated by Lord Brougham—in opinions delivered by them in the House of Lords, and the views pronounced and action taken by the learned judges of the Divorce Division, involve a question not directly raised upon this appeal—namely, whether without express legislative sanction, Courts having jurisdiction in divorce may by estoppel or like device ensure that one of the spouses

(1) [1898] P. 178, 185. (2) [1926] A. C. 444, 456.

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shall not resort to a jurisdiction other than that in which both were domiciled, and invoke its powers, on the ground of domicil newly acquired within its authority, to change the status of the spouse left resident in the original place of domicil. It is not necessary on this occasion to deal specifically with that question." The principle that jurisdiction in divorce is founded on domicil has long been a cardinal one. The exception to the general rule noticed in *Armytage* v. *Armytage* (1) is also of long standing, and did not originate with the dictum quoted from that case. It is to be found as long ago as 1878. In that year Brett L.J. in the Court of Appeal in the course of his judgment in *Niboyet* v. *Niboyet* (2) says: "The case of an adulterous husband deserting his wife by leaving the country of his domicil and assuming to domicile himself in another, might seem to raise an intolerable injustice; but we cannot help thinking that in such case, if sued by his wife in the country in which he had left her, he could not be heard to allege that that was not still the place of his married home, i.e., for the purposes of that suit, of his domicil." Although *Lord Advocate* v. *Jaffrey* (3) and *Salvesen* v. *Administrator of Austrian Property* (4) form with *Attorney General for Alberta* v. *Cook* (5) a group of decisions of the highest authority, enforcing domicil as the test of jurisdiction, the proposition now contended for is not in conflict with them. It is not contended that the husband cannot change his domicil and with it that of his wife, but that in a certain case he cannot be heard to say that he has changed his wife's domicil.

[Lord Merrivale. The proposition may be thus stated. A wrongdoer will not be heard to persuade the Court to look upon his domicil as changed.]

C. Beddington for the husband. In *Attorney-General for Alberta* v. *Cook* (5) the doctrine now contended for is described as merely a "possible" exception to the general rule of domicil. The dictum in *Armytage* v. *Armytage* (1) has never actually

(1) [1898] P. 178.
(2) (1878) 4 P. D. 1, 14.
(3) [1921] 1 A. C. 146.
(4) [1927] A. C. 641.
(5) [1926] A. C. 444.

been followed in any contested case that can be found. On the other hand in *Janion* v. *Janion* (1), in which case the respondent husband set up a subsequent change of his domicil in answer to his wife's suit on the grounds of adultery and desertion, recognition was accorded to his plea to the extent of directing an issue to be tried on the question of fact of change of domicil. To that extent the case is a contradiction of the dictum in *Armytage* v. *Armytage*. (2) Of the other cases reported neither *Stathatos* v. *Stathatos* (3) nor *De Montaigu* v. *De Montaigu* (4) furnish any exception to the general rule. In both of these cases the wife had been excluded, so to speak, from the domicil of the husband by decrees annulling the marriages. The case may be thus stated. If the dictum in *Armytage* v. *Armytage* (2) is good law its operation is limited to cases where the acquisition by the husband of a fresh domicil is part of his matrimonial offence.

Mortimer in reply. The present is no doubt a case of first impression, as the doctrine involved in the dictum in *Armytage* v. *Armytage* (2) has not so far been delimited or defined in a defended case, but since *Attorney-General for Alberta* v. *Cook* (5), deciding that even after a judicial separation the wife cannot acquire a separate domicil, it is all the more necessary to affirm that she is not compelled to follow her husband round the world. In this sense the suggestion at the close of the judgment in the Court of Appeal in *Ogden* v. *Ogden* (6) goes even further than *Armytage* v. *Armytage*. (2)

[He also referred to *Manderson* v. *Sutherland*. (7)]

Cur. adv. vult.

June 25. The President (Lord Merrivale). The question sought to be raised by this summons is whether there is a rule of law governing the jurisdiction in divorce whereby as between parties originally of English domicil a husband judicially separated from his wife, and alleged to be afterwards

(1) The Times, 1924, March 20.
(2) [1898] P. 178.
(3) [1913] P. 46.
(4) [1913] P. 154.
(5) [1926] A. C. 444.
(6) [1908] P. 46, 82.
(7) (1899) 1 F. 621, 629.

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guilty of adultery, is disentitled to allege in proceedings for dissolution of marriage that since the decree of judicial separation he has become domiciled elsewhere.

The domicil of origin of the parties in this case is English. They were married in England in 1915. In 1921 a decree of judicial separation on the ground of desertion was pronounced at the instance of the wife. Later in the same year she petitioned for dissolution of marriage on the ground of the alleged adultery of her husband, but in pursuance of an agreement for valuable consideration made between her, her husband and his father, that petition was on her application dismissed. She now petitions for dissolution of marriage on the ground that the husband has during 1927 and 1928 lived in adultery at Nice.

The respondent appeared to the petition under protest, alleging himself to be domiciled in France, and at his instance an order has been made for the trial of an issue in order to determine whether he is or is not domiciled in England. He has filed affidavits which make a prima facie case of domicil in France. The petitioner, after time for an appeal against the order for an issue has expired, applies to set aside the order and alternatively for directions for trial of the issue upon viva voce evidence at the hearing of the petition. Extension of time for appealing is sought, and must be allowed.

For the petitioner it was argued at the hearing of the summons that a husband domiciled in England who deserts his wife is thereupon estopped from asserting that he has acquired domicil elsewhere. It was also argued that the wife so deserted is entitled to determine the forum in which the proceedings as to the marriage shall be taken. In effect, what was contended for is a condition as to domicil stereotyped by or upon the decree of judicial separation, or incapable of being altered without the consent of the wife.

Admittedly there is no direct authority for the proposition of law which the petitioner asserts. In old cases like *Warrender* v. *Warrender* (1) ; *Dolphin* v. *Robins* (2) ; and *Pitt* v. *Pitt* (3)

(1) (1835) 2 Cl. & F. 488. (2) (1859) 7 H. L. C. 390.
(3) (1864) 4 Macq. 627.

there was discussion in the House of Lords as to whether a wife separated from her husband by judicial decree granted at her instance may acquire domicil other than that of her husband. In *Armytage* v. *Armytage* (1) Lord Gorell (then Sir Gorell Barnes) stated an opinion that in the case of a wife antecedently domiciled here and deserted here by her husband, the husband "cannot be allowed" (in the wife's suit for dissolution of marriage) "to assert for the purposes of the suit that he has ceased to be domiciled in this country." In *Ogden* v. *Ogden* (2) the same learned judge made a more detailed statement. "In cases where a wife has been deserted in the country of the domicil by her husband in circumstances entitling her to sue for divorce, it has been held that she might sue in the Courts of the country of the domicil notwithstanding the fact that the husband has left the country and might possibly have done so with the intention of acquiring a domicil in another country. The decree in such a case is justified, either by considering that the husband cannot be heard to say that he has changed his domicil, or, as some have thought, that the wife must ex necessitate be entitled to treat the country of the previous matrimonial domicil as still being the country of her domicil, and to require its Courts to do justice to her, because otherwise it would be impossible for a wife so situated to obtain a decree, as the respondent might keep changing his abode from place to place, asserting that he had abandoned his original domicil, and any domicil with which it were sought to fix him."

The opinions expressed obiter in *Warrender* v. *Warrender* (3); *Dolphin* v. *Robins* (4); *Pitt* v. *Pitt* (5), and such cases, do not accord with many later decisions in the supreme tribunals. The passages in *Armytage* v. *Armytage* (1) and *Ogden* v. *Ogden* (2) were not statements of opinion to which effect was given by a judgment of the Court, either here or in the Court of Appeal. They express, however, the considered views of an eminent judge who up to 1908 had been for many

(1) [1898] P. 178, 185.
(2) [1908] P. 46, 78.
(3) 2 Cl. & F. 488.
(4) 7 H. L. C. 390.
(5) 4 Macq. 627.

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years engaged in administering the jurisdiction in divorce which is here exercised. On the other hand they have not commanded the common assent of jurists (1), and the Judicial Committee of the Privy Council, in *Attorney-General for Alberta* v. *Cook* (2), while it did not deal directly with the question involved in this case, laid down as axiomatic in the jurisdiction in divorce that one of the effects of marriage is to give the spouses a common domicil in the domicil of the husband; that the jurisdiction to decree dissolution of marriage is the jurisdiction of the country of the domicil and that it is a requisite of the jurisdiction to dissolve marriage that the defendant in the proceedings should be domiciled in the jurisdiction.

Counsel for the petitioner frankly said in the course of his argument that he knew of no case in which effect had been given to the propositions embodied in the dicta from *Armytage* v. *Armytage* (3) and *Ogden* v. *Ogden* (4) which I have cited, and if they are of authority they define an exception to the principles—most strongly emphasized in recent judgments of the House of Lords and the Privy Council—that under British law the jurisdiction to decree divorce depends on domicil; that the domicil of the husband determines the domicil of the wife; and that independent authority to decree divorce cannot, consistently with English law, co-exist at the same time in two sovereign States.

When the opinions cited from *Armytage* v. *Armytage* (3) and *Ogden* v. *Ogden* (4) are carefully examined it becomes clear that they do not purport to lay down a rule of law. They purport rather to state the practice of the Court. It is urged, however, that they necessarily involve the proposition for which the petitioner contends, which must be given effect to in that sense.

What, then, is the suggested rule, what is its origin, and how does it operate? It supposedly relates, as I understand, to people whose domicil of origin is English. No one has ever suggested that the residence of foreigners which gives

(1) Dicey, Conflict of Laws, 4th ed., pp. 101 (*n.*), 123.

(2) [1926] A. C. 444.

(3) [1898] P. 178.

(4) [1908] P. 46.

jurisdiction to decree judicial separation stereotypes the domicil of either of them. Nor is it thought, I believe, that in the case of citizens of foreign or colonial origin, resort of an injured wife to an English Court, with or without domicil of choice here, would render the defendant in the suit legally incapable of reverting to his domicil of origin overseas or choosing a permanent home and finding a new domicil elsewhere. If the rule exists, it would seem to have some remarkable exceptions. No such rule forms part of the common law. Until 1857 the power to dissolve a marriage by judicial decree did not exist.

There was no room or use for such a rule in the Courts which exercised jurisdiction to decree divorce a mensa et thoro. That jurisdiction depended simply on residence. There is no such provision in any of the Matrimonial Causes Acts. So as a substantive proposition of English law the alleged rule cannot be sustained.

How then and to what extent can the Court, within its due authority, give effect in practice to a resolution like that stated in *Armytage* v. *Armytage* (1), that a husband who deserts his wife here shall "not be allowed" in the wife's suit for dissolution of marriage "to assert for the purposes of the suit that he has ceased to be domiciled in this country," or, as was said in *Ogden* v. *Ogden* (2), that a wife so deserted in circumstances entitling her to sue for divorce shall be admitted to sue here, "notwithstanding the fact that the husband has left the country and may possibly have done so with the intention of acquiring domicil in another country"? It is suggested that the principle of estoppel is available.

In the eighteenth century jurisdiction was gained in English Courts by resort to legal fictions—supposititious residence in Cheapside, untrue averments of imprisonment in the Marshalsea or of indebtedness to the Crown and the like—with the aid of rules of procedure which prevented the raising of issues of fact in respect of matters going to the jurisdiction. In this twentieth century His Majesty's Courts do not proceed on like lines. The suggestion that a respondent

(1) [1898] P. 178. (2) [1908] P. 46.

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should be met by an estoppel in limine in the matter of jurisdiction when a petition alleges a state of facts such as is forecasted in *Ogden* v. *Ogden* (1) is a proposal to resort to a legal fiction and not an appeal to an estoppel in the true sense.

Estoppel, as has been said in a number of cases, is a rule of evidence: *Seton & Co.* v. *Lafone* (2); *Low* v. *Bouverie* (3); *Liverpool, &c., Steamship Co.* v. *Mersey Trading Co.* (4); *Oliver* v. *Bank of England.* (5) To quote an early definition: "Estoppel is when one is concluded and forbidden in law to speak against his own act or deed, yea, though it be to say the truth." (6) Estoppel prevents a man from denying the matter of some statement that he has made, or some representation which has induced another to alter his position. In legal proceedings waiver may work estoppel as acquiescence may in the course of a business transaction.

The rule of evidence which produces estoppel operates in the trial of issues as to domicil in this Court to the same extent as in other proceedings in the High Court and not otherwise; the statute which established the jurisdiction in divorce directed that the Court should proceed upon the rules of evidence in force in the courts of common law. An issue of domicil, therefore, is not to be prejudged so as to give effect to a presumption of law, but is to be duly tried to determine the relevant matters of fact. It may even be that the effect in point of fact of a proved desire to avoid a jurisdiction may have to be weighed together with other relevant facts, as was done with interesting results by Neville J. in the Chancery Division in a case of *Drexel* v. *Drexel.* (7)

What follows from the considerations I have stated is that the respondent's allegation, by way of objection to the jurisdiction of the Court, that he is domiciled in France must be tried like any other issue. Upon the trial the Court will determine whether the respondent has taken up his residence

(1) [1908] P. 46.
(2) (1887) 19 Q. B. D. 68.
(3) [1891] 3 Ch. 82.
(4) [1909] 1 Ch. 209.
(5) [1902] 1 Ch. 610.
(6) Termes de la Ley, tit. "Estoppel."
(7) [1916] 1 Ch. 251.

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in France and is in truth resident there with that intention which combined with residence results in a change of domicil. Then, and particularly on the last mentioned topic, the matters which gave rise to the pronouncements in *Armytage* v. *Armytage* (1) and *Ogden* v. *Ogden* (2) will have whatever may be their due weight.

The application to rescind the order for trial of the issue fails. As to the mode of trial, the state of the facts makes it highly desirable that the issue shall be tried upon evidence given viva voce, and the proper mode of securing this will be to direct, as I do, that the issue be set down for trial with the cause, so that if the preliminary decision be in favour of the petitioner she may forthwith proceed to establish her right to a decree.

Solicitors for the wife: *Watkins, Phipos & Brown.*
Solicitors for the husband: *Mawby & Barrie.*

R. M. M.

DIVORCE.

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July 2, 16.

SHERWOOD *v.* SHERWOOD.

Divorce—Permanent Maintenance of Wife—Proportion of Husband's Income—Deduction of Taxes—Current Year.

In estimating the disposable income of a divorced husband after meeting his liability for taxes for the purpose of allotting permanent maintenance to his wife in futuro within the principle of *Dayrell-Steyning* v. *Dayrell-Steyning* [1922] P. 280, the amount of deduction from his gross income in respect of income tax and super tax is the amount of those taxes normally chargeable on income received during the current year. An extraordinary amount in respect of arrears of taxes payable in that year but not chargeable in respect of the gross income of that year is not an allowable deduction.

Dayrell-Steyning v. *Dayrell-Steyning* [1922] P. 280 explained.

Adjourned Summons.

The wife, petitioner in a suit for dissolution of marriage, having obtained a decree nisi on July 26, 1927, filed her petition

(1) [1898] P. 178. (2) [1908] P. 46.

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for permanent maintenance on December 14, 1927, alleging the income of the respondent husband to be 15,000*l.* per annum.

The respondent by his answer set up a net income from earnings of 6153*l.* 10*s.* in 1925, 3959*l.* 2*s.* 1*d.* in 1926 and 1258*l.* 6*s.* 2*d.* in 1927. These figures were net. He also admitted an income from investments of 1090*l.* The petitioner, in reply, alleged that in 1923 the income of the respondent from earnings was 20,000*l.*, in 1924 19,000*l.* and 1925 nearly 14,000*l.*, after which, as was admitted, the income of the respondent was affected by his health, which interfered with his earning capacity. The respondent was an unqualified practitioner in a branch of surgery. There were two children of the marriage in the custody of the petitioner, both boys, born in 1925 and 1926 respectively. Alimony pendente lite was at the rate of 2000*l.* per annum. The decree was made absolute in February, 1928. The registrar to whom the petition for permanent maintenance was referred reported that the gross income of the respondent for 1927 was 7500*l.* per annum, and that his net income after paying income tax and super tax and 400*l.* on a policy and the expenses of earning the income in question was 1900*l.* in the same period, and that the petitioner had a separate income of 107*l.* The registrar on May 25, 1928, made an order for the payment of 200*l.* per annum during the joint lives of the parties and for a further sum of 400*l.* per annum to be secured to the petitioner for her life. He further ordered annual payments of 150*l.* for each child, and in a further report giving his reasons at the request of the parties stated that following *Dayrell-Steyning* v. *Dayrell-Steyning* (1) he had allotted one-half approximately of the disposable income of the husband remaining in his hands after paying the expenses of earning it. The wife took out a summons returnable before the judge in chambers to vary the order of the registrar. On June 26, 1928, the summons was heard in chambers by Lord Merrivale P., and he adjourned it into Court for judgment.

Noel Middleton for the petitioner.

Cotes Preedy K.C. (*Bush-James* with him) for the respondent.

(1) [1922] P. 280.

July 2. THE PRESIDENT (LORD MERRIVALE) [after dealing with the facts and figures of the case, of which the above is a summary, proceeded as follows:] The parties debated before the learned registrar the result of the direction which was given by the Court in the case of *Dayrell-Steyning* v. *Dayrell-Steyning* (1), which was to the effect that in apportioning maintenance to a wife upon the principles on which the Court acts, the apportionment should be an apportionment out of the disposable income of the husband, after meeting his liability for taxes, of a proportionate part of that income, which should come to the wife under the same conditions of freedom from taxes as affected the residue which remained in the hands of the husband, that is, that there should be a common measure for each of them as to the nature of their claim and one should not be paying a greater rate of tax out of a notional amount of income and providing the other with a disproportionate income tax free. *Dayrell-Steyning* v. *Dayrell-Steyning* (1) had no other effect than that, and I do not think the language in which the judgment in that case is expressed is reasonably capable of any other interpretation than that. But the question in this case arose, as it was said, by reason of some possible construction of the direction given in *Dayrell-Steyning* v. *Dayrell-Steyning*. (1)

The position of the respondent here, the husband, was exceptional in this way. He had a very large income in normal years derived from exertions which required personal skill on his part and a high degree of confidence on the part of persons who put themselves in his hands for treatment. He was not a registered medical practitioner, but he was a practitioner of curative processes, and obviously his personal skill and the confidence he inspired were material factors. It was also material that he should be in good health. By reason of ill health his earning capacity ceased during a substantial time, and, no doubt, he was left with the prospect of relying to a very considerable extent upon the resources he had saved and accumulated. He had at one time accumulated funds, which, at the face value of the investments, at any rate,

(1) [1922] P. 280.

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represented a sum of between 30,000*l.* and 40,000*l.* That became a good deal reduced. In the years before 1926 the respondent was earning an income which was assessed for taxation at 17,000*l.* or 18,000*l.* annually. In 1926 that became greatly reduced, and the reduction continued during, at any rate, part of 1927. The income from earnings became little better than nominal as compared with the great earnings there had been. Then in 1927 the respondent's health improved, and what was agreed between the parties was (and it was pretty plain on seeing him) that he had quite recovered, and was able to proceed to earn such an income as he had been accustomed to earn. When the matter came before the learned registrar he had before him proof which he accepted and about which the parties had not cavilled, that the taxable income of the respondent for the year 1927 would not be less than 7500*l.* That represents such earnings as he was able to make during that year and such income as he derived from investments. He had, in fact, the income of investments of a capital value of something under 23,000*l.* Adding the two together, he had a total taxable income of about 7500*l.* There was the one side of the account necessary for the purposes of determining upon what basis the wife's maintenance in futuro should be computed. In the year 1927 the respondent was, it appears, liable for income tax and super tax to the tune of between 5000*l.* and 6000*l.*, and acute conflict arose between the parties whether, basing the income for calculation in futuro upon the earnings and income from investments for the year 1927, the registrar ought to deduct from that total the amounts payable by the respondent in that year in respect of super tax and income tax. In view of the fact that what was to be determined was what maintenance should be provided in futuro for the wife until further order, it seems a startling proposition, but the husband's representatives contended before the registrar, and they contended before me, that the income out of which the wife's maintenance was to be awarded was the residue of income remaining in 1927 after payment, or provision for payment, of the King's taxes which fell due in that year, which left, of course, in that year a very small

amount of total net income—something like 1900*l.* It was argued for the petitioner that the calculation to be made is a calculation which is to have future effect in determining what should be hereafter the maintenance allotted to the wife out of the income which is hereafter capable of being earned, or is securable by the husband out of his investments.

Before the learned registrar the contention for the husband prevailed, and the husband, who had had past earnings at the rate of 15,000*l.* to 20,000*l.* a year and had the prospect of having as good earnings for the future, was held to discharge his obligation towards the wife if he were hereafter to pay her an income for their joint lives at the rate of 600*l.* a year—a little less than a third of the residue of his nominal income for 1927—and to secure 400*l.* of that sum. Provision was also ordered for the children at the rate of 150*l.* per annum.

The question is whether the direction of the Court in *Dayrell-Steyning* v. *Dayrell-Steyning* (1) properly has that result. What was said is that, for the purpose of computation of the income a proportion of which under the practice of the Court would go to the wife the husband's income should be regarded as the disposable amount which remains in his hands after he has provided the necessary expenses for earning it, including income and super tax. (At that time it included also excess profits duty.) I cannot conceive when it is regarded in the light of the practice of the Court in these matters that the direction in *Dayrell-Steyning* v. *Dayrell-Steyning* (1) can be employed with this startling result. As I say, the question is what the husband is able to provide out of his earnings and income year by year in futuro for his wife by way of maintenance in futuro. How it affects that problem that in a past year the husband, by reason of great earnings in years previously to that, should have been liable for income tax which left him a small margin only out of his income in that year, I fail to understand.

It seems to me clear that a mistake has been made and that that to which the wife is entitled is an allotment of

(1) [1922] P. 280.

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income out of such income as it may be confidently expected the husband will be able to command from year to year. Nobody professes to put that amount at less than 7500*l.* gross ; that is, from investments and from earnings. The question is what allowance in respect of that is proper to be made by reason of the husband's necessity of meeting the taxes as they fall due from year to year. As far as one can see the taxes which fall due in this year and seem likely to fall due in coming years do not amount to more than something under 2000*l.* That is the amount to be deducted from the total income in order that what may be apportioned shall be the disposable amount remaining in the husband's hands—the balance of the 7500*l.* after providing for the taxes from year to year. The sum which is left is the sum of 5500*l.* a year. Assuming in favour of the husband that the provision for the maintenance of the children is a liability which ought to be taken into account, at the assessment the learned registrar has made of it, there is an income of above 5000*l.* after providing for taxes. If you adjust it by taking account of an income which it is said the wife derives from property, you still have a sum substantially in excess of 4800*l.* a year, and it seems to me that, applying the ordinary principles which are applied by the Court where there is something in the nature of a normal income, the amount which falls due to be allotted to the wife is not a sum of 600*l.* but a sum during the joint lives of 1600*l.* a year until further order.

As to the amount secured, that depends upon the property of the husband in the way of investments, or otherwise. Some evidence was given before me on that matter, but it was shown that, notwithstanding changes in investments at recent dates, there remains a capital value realizable in the market at the present time of very nearly 22,000*l.* There is an income represented of nearer 1100*l.* than 1000*l.* a year. I see no hardship in confirming the order that there should be secured to the wife for her life the maintenance which the learned registrar's order provided for, that is, maintenance at the rate of 400*l.* a year. Looking at the matter as a whole, I do not see any reason for disturbing the terms of the order which

provides for the maintenance for the time being of the children. The variation I make of the order is to substitute for the allotted sum of 600*l.* a year for their joint lives the amount of 1600*l.* a year, of which 400*l.* will be secured to the wife for life.

July 16. On the case again being before the Court the President said: I gave judgment in this matter during the interlocutory proceedings recently without consideration of the fact that the matter might, having regard to the sum involved, be thought proper for discussion in the Court of Appeal. The statement I made with regard to the grounds upon which I took the view at which I, in fact, arrived, is, I have no doubt, perfectly understood by the counsel who are engaged, and if counsel who are familiar with proceedings in these cases conduct the appeal, they will be perfectly well able to supply the Court of Appeal with the axiomatic matters which a judge sitting here does not think it necessary to formulate in the presence of counsel of experience in cases of this kind, by whom they are assumed to underlie any order which may be made. What is in question in a case of this kind is, first of all, the maintenance proper to be ordered under the statute for the petitioner during the joint lives of the parties, then the question whether there shall be security, and then the question whether there shall be some provision for a wife who is a successful petitioner in the event of her surviving the respondent. What is to be done is not to allot a sum to the petitioner out of the past income of the respondent, but to order a provision for her for her future. In determining the questions which then arise, regard is had, as a matter of evidence, to the income that the respondent has, in fact, enjoyed, at any rate, during recent years; but what has to be ascertained, so far as can be done, in order to provide the basis for the order which is to be made, is what will be the respondent's income when the order comes into operation, in other words his potential income. When the potential income of the respondent is ascertained, so far as it is practicable to ascertain it, the course which is taken in

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normal cases—the course which is taken and has been taken, at any rate, during the period in which I have had any experience in these matters—has been to allot the petitioner, the wife, about one-third of the expected income of the respondent, the party who was the husband. These are elementary matters here, but as I am conscious that in dealing in my judgment with the particular points which arose in the case I made no definite reference to these elementary matters, it has seemed to me that having regard to the substantial sum involved, the matter may go to the Court of Appeal, and therefore it is only respectful to the Court of Appeal and fair to the parties that I should add this statement to the reasons I gave for the conclusion at which I arrive upon the topics which were actually discussed before me. The elementary questions to which I have now referred did not come into discussion.

On the application of counsel for the respondent leave to appeal was given on security being given for the wife's costs of appeal in any event.

Solicitors for the wife petitioner: *Lewis & Lewis.*
Solicitors for the respondent husband: *Croft & Russell.*

R. M. M.

DIVORCE.

1928
July 30.

C. L. *v.* C. F. W.

Divorce—Practice—Permanent Maintenance of Wife—Husband of Unsound Mind—Receivership Order in Lunacy of Husband—Form of Order in Divorce Proceedings for Maintenance of Wife.

The jurisdiction in Lunacy to appoint a receiver of the estate of a person of unsound mind does not exclude other Courts from enforcing lawful claims against his estate, including claims arising in the Divorce Division. Although the primary duty of those concerned with the care of a person of unsound mind is to apply his estate for his maintenance, and there is power under the Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 171, to direct a settlement of the property of a lunatic or defective, the Divorce Division is not thereby discharged from the duty of providing for the permanent maintenance of a petitioning wife out of the estate of a respondent husband of unsound mind. When by an order in Lunacy a provision has been directed for the wife during the lifetime of the husband and pending his incapacity, and the Divorce Division approves the quantum of the order, the proper course on application in that Division by the wife for permanent maintenance is to order it to be secured to her at the rate ordered in Lunacy so far as the husband's means permit and without prejudice to any further order in Lunacy, the security not to be enforceable pending subsistence of the order in Lunacy, and should it subsist during the life of the husband not to be enforceable till his death.

Summons adjourned into Court for judgment.

Wife's petition for permanent maintenance.

The wife filed her petition dated January 18, 1927, for dissolution of marriage on the ground of the adultery of her husband. A decree absolute was pronounced on October 17, 1927. There was one child of the marriage within the age of custody, and the custody of it was decreed to the petitioner. Pending the suit a receivership order in Lunacy had been made against the respondent husband. By an order in Lunacy dated August 13, 1927, annual allowances out of the estate of the respondent were ordered as follows—namely, 250*l.* for the maintenance of the respondent, 156*l.* for the maintenance of the petitioner, and 52*l.* for the child of the marriage till it should attain the age of sixteen. While this order was still in force and being acted upon, on October 21, 1927, the petitioner filed the present petition for permanent maintenance

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and security under the Judicature Consolidation Act (15 & 16 Geo. 5, c. 49), s. 190. The amounts payable under the order in Lunacy in fact absorbed more than the income of the respondent, and resort had been made to capital from time to time under the order of the Court. The answer to the petition for maintenance which was filed on behalf of the respondent by order of the Master in Lunacy by the receiver in the Lunacy submitted that no order for permanent maintenance should be made. The registrar having made no order on the petition for maintenance the petitioner appealed to the judge in chambers.

H. B. Durley Grazebrook for the petitioner.

The solicitor for the receiver contra.

The President (Lord Merrivale) (the judge in chambers) adjourned the case into Court for judgment.

1928. July 30. The President (Lord Merrivale) [after stating the facts.] The order in Lunacy is still in force, but the wife's advisers felt, and rightly felt, that she was not entirely secured by it, because the jurisdiction under which it is made is a jurisdiction terminable in various events, and terminable at any rate either upon the recovery of the patient of his mental capacity or the death of the patient. In the event of the recovery by the patient of his faculties or in case of the death of the patient during his life or after his death the petitioner would be left unprovided for. That state of facts was quite properly brought to the notice of the Court. The question is what under the circumstances ought to be done. One outstanding consideration is that the jurisdiction in Lunacy, where the responsibility for the persons and the estates of patients is vested, ought never to be interfered with from outside, and no order ought to be made here which interferes with the absolute control of the person and the estate of the patient in this case, where it is vested in the Lords Justices as a matter of judicial control and the Masters in Lunacy as a matter of practice and administration. I, therefore, have to take care that the jurisdiction in Lunacy is not encroached upon.

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That that jurisdiction exists is manifest to those who are familiar with the authorities. It has never been held, though, to exclude the Courts from enforcing the statutory or common law rights of persons having lawful claims. A variety of cases have arisen where creditors of lunatics and other persons having lawful claims have been held entitled, notwithstanding the general control of the lunatic and his estate under the powers of the Crown and the statutory powers of the Lords Justices in Lunacy, to enforce their remedies: *Davies* v. *Davies* (1); *In re Tuer's Will Trusts* (2); *Horne* v. *Pountain* (3); and *In re Leavesley*. (4)

On behalf of the receiver it was very fairly said that the receiver had no desire to prevent the petitioner from getting such security as she might lawfully have by reason of the jurisdiction existing under s. 190 of the Judicature (Consolidation) Act, but it was also pointed out that, the primary duty of those concerned with the care of the lunatic being to apply his estate in the first instance and so far as may be necessary for his maintenance, no order ought to be made, or indeed can lawfully be made, which would purport to interfere with the due execution of that duty. I think that was a proper view to take of the case. I have had some doubt whether the latest amendment of the law relating to lunatics which is found in the Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 171, might not perhaps afford an alternative means for the present applicant of securing those advantages which in this Court are deemed, upon a proper footing of fact, to be her statutory rights. The Court in Lunacy now has power to direct a settlement of property of a person of defective mental capacity. On consideration of the matter, however, I think that the existence of a power of that kind elsewhere does not discharge this Court from consideration of the question whether the present case is one in which the petitioner is entitled to an order for provision outside of the provision made for her under the powers of the Lords Justices in Lunacy, and operative not only in the event of the recovery of his faculties by the patient,

(1) (1852) 2 D. M. & G. 51.
(2) (1886) 32 Ch. D. 39.
(3) (1889) 23 Q. B. D. 264.
(4) [1891] 2 Ch. 1.

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but in the event of his death. I have come to the conclusion that this Court ought not to decline to exercise the jurisdiction which is reposed in it in the questions which arise under the divorce jurisdiction, and that in this case it was necessary to consider whether the petitioner had shown grounds on which, apart from the allegation of lunacy, an order ought to be made here, and if so what order ought to be made and what should be the limitations of the order. Now subject to the overriding duty of those entrusted with the care of the lunatic and his estate during lunacy to provide for him, I think the provision which was decided upon by the Master in Lunacy is the proper provision for the wife, that is, provision at the rate of 3*l.* a week, and I think what is necessary to do is to ensure that that provision shall remain available to the wife in the event of the recovery by the respondent of his mental faculties, and in the other event of the death of the respondent. That is to say during his life, irrespective of his mental condition, and for her life after his death, the wife shall be entitled to maintenance, if the husband's means extend to it, at the proper rate of maintenance which has been determined upon by the Master in Lunacy. As to the limitation proper to be made, I think the order should direct that the husband shall, to the satisfaction of the Court, secure to the wife the maintenance I have mentioned; but that the charge to be made to secure that maintenance shall be a charge without prejudice to all orders heretofore made or hereafter to be made under the authority of the Lords Justices or Masters in Lunacy in respect of the estate of the respondent and in respect of maintenance. The charge to be so created shall not be enforceable while the order in Lunacy subsists, and if that order subsists during the whole lifetime of the respondent it shall become enforceable upon his death. Difficulty may arise as to the due execution of this charge. There is a statutory power to direct the execution of the charge by an officer of the Court where a person concerned refuses or neglects to comply with the order of the Court, and there are a variety of cases which illustrate the application of this provision as to neglect. For instance, in the case of

neglect to pay taxes, neglect arises where there is the bare statutory duty although there has been no demand and no communication of the assessment. There are authorities upon that subject. It may be that the question will have to be raised here as to the proper mode of compliance with the direction of the Court for the execution of such a charge, and it may be that those who advise the petitioner will think it necessary to invoke the jurisdiction of the Lords Justices under s. 171 of the Law of Property Act. Be that as it may, what results from the consideration which I have given to this case is that there ought to be an order upon the husband, that there ought to be the limited and conditional charge upon his property which I have specified, and that proper means must be taken in due course for giving effect to that conclusion in such a way that upon the recovery of the respondent of his mental faculties or upon his death the maintenance for the wife, according to what means may then subsist, shall be ensured.

Grazebrook. With regard to the petitioner's costs of the application before the learned registrar, I should ask that provision should be made for those.

THE PRESIDENT. I am not sure about your position there. These may be necessary expenses of the lunatic. If they are, they are expenses which will be provided for elsewhere. I have no control over the present assets of the lunatic in that way. The management of his estate is in a receiver in Lunacy, and my impression is that your best course will be to see what happens there. I reserve liberty to your client to apply, but that is all I can say at present.

Solicitors for the wife: *Jaques & Co., for Richardson & Parker, Scarborough.*

Solicitors for the receiver: *Burton, Yeates & Hart, for Hart Jackson & Sons, Ulverston.*

R. M. M.

END OF VOL. AND OF PROBATE SERIES FOR 1928.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 2, 1928, will be as follows :—

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